CC 1.12/2a:96/2

284-A

VOL. 96 (2d Series) September 1–30, 1984 No. 2

Doc. Ctr.
HE
7761
.A381

# FEDERAL COMMUNICATIONS COMMISSION REPORTS

## (96 F.C.C. 2d)

**Decisions, Reports, Public Notices, and Other Documents of the Federal Communications Commission of the United States**

## VOLUME 96 (2d Series)

## Pages 685 to 1254

**Reported by the Commission**

UNIV. of MICH.
NOV 6 1984
Documents Center

## FEDERAL COMMUNICATIONS COMMISSION

Mark S. Fowler, *Chairman*

| | |
|---|---|
| James H. Quello | Henry M. Rivera |
| Mimi Weyforth Dawson | Dennis R. Patrick* |

Commissioner Fogarty's term expired June 30, 1983.
Commissioner Jones resigned May 31, 1983.
Commissioner Sharp's term expired June 30, 1983.
*Sworn in December 2, 1983.

UNITED STATES GOVERNMENT PRINTING OFFICE • WASHINGTON, D.C.

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402—on a subscription basis

UNIVERSITY OF MICHIGAN
LIBRARIES
OCT 31 1984

DEPOSITED BY THE
UNITED STATES OF AMERICA

Notice: The contents of this pamphlet are subject to correction by means of an erratum appearing in the bound volumes of the *F.C.C. Reports.* Users are requested to notify the F.C.C. Publications Branch of errors so that an erratum can be inserted in the bound volume.

NOTE: This is the last pamphlet in Volume 96.

**NOTE: The index to this pamphlet includes alphabetized document titles and other descriptive data accumulated from previous and current issues in this particular volume. Refer to pages shown on the cover of the pamphlet to distinguish which documents are available in this issue.**

## INDEX

Page
**Affinity Communications, Inc.; re Application for new FM b/c station and petition for leave to amend granted, BC Docket No. 82–397, (FCC 84R–24) ... 685**
**Affinity Communications, Inc.; re Applications for construction permit for new FM station, BC Docket No. 82–397, (FCC 83D–58) ... 689**
**Alan K. Levin; re Review Board denied petition to enlarge issues, BC Docket No. 80–712, (FCC 84R–10) ... 710**
**Alan K. Levin; re Applications for construction permit, BC Docket No. 80–712, (FCC 83D–39) ... 714**
**Amendment of Part 67; re Joint Board announces basic principles and structure for NTS cost allocations, CC Docket 80–286, (FCC 83–564) ... 781**
**Amendment of Part 76: re *NPRM* adopted, Section 76.12, MM Docket 83–1292 (FCC 83–554) ... 1**
**Angeles B/c Newtork: re Interim operator for former station KHOF, MM Docket 83–1001, (FCC 84R–2) ... 5**
**A.S.D. Answer Service; re Attorney work product doctrine, C C Docket No. 82–587, (FCC 84–28) ... 886**
**AT&T Co.: re *Memorandum Opinion, Order and Authorization* adopted, Sections 214 and 310(d) of Communications Act of 1934, (FCC 83–566) 18**
**AT&T Co.: re Emergency petition for reconsideration granted, CC Docket 83–372, (FCC 83–598) ... 112**
**AT&T Co.: re *Report and Order* adopted terminating license contract inquiry, CC Docket 80–742, (FCC 83–601) ... 122**
**AT&T Co.: re Provisions of basic services via resale by separate subsidiary, (FCC 83–604) ... 156**
**Audicom Corp.; re Authority granted for general use of facilities by licensees in b/c services, Section 303(e), (Del. Auth. 84–02) ... 898**
**Big Bend B/cers: re Review Board affirmed grant of CP, BC Docket 82–559, (FCC 83R–103) ... 166**
**Big Bend B/cers: re Applications for CP and FM station, BC Docket 82–559, (FCC 83D–37) ... 175**
**Broadcast Corp. of Georgia (WVEU-TV); re Petitions for reconsideration of Commission's action denied, (FCC 84–38/FCC 83–291) ... 901**
**Common Carrier Services; re Cancellation of tariffs and no further tariffs accepted for filing, CC Docket No. 79–252, (FCC 84–82) ... 922**
**Continental Cablevision of New Hampshire, Inc.; re Application for review denied, (FCC 84–85) ... 926**
**Cordless Telephones: re Amendment of Part 15, Gen. Docket 83–325, (FCC 83–597) ... 195**
**Dayton Telecasting, Inc: re Joint settlement agreement approved, BC Docket 81–617, (FCC 83R–97) ... 214**
**Dayton Telecasting, Inc.: re Applications for CP, BC Docket 81–617, (FCC 83D–26) ... 219**

Depreciation Rates: re Prescription of revised percentages of depreciation, BOCs, (FCC 83-587) .......... 257
Depreciation Rates: re Prescription of revised percentages of depreciation, GTE Cos., (FCC 83-588) .......... 297
Depreciation Rates: re Prescription of revised percentages of depreciation, United Inter-Mountain Telep. Co., (FCC 83-589) .......... 319
Depreciation Rates: re Prescription of revised percentages of depreciation, Alascom, Inc., (FCC 83-590) .......... 329
Depreciation Rates: re Prescription of revised percentages of depreciation BOCs, (FCC 83-591) .......... 338
Depreciation Rates: re Prescription of revised percentages of depreciation, GTE Cos., (FCC 83-592) .......... 355
Depreciation Rates: re Prescription of revised percentages of depreciation, BOCs/Continental Telep. Co., (FCC 83-607) .......... 368
Deregulation of Radio; re Commission determined that issues/programs list should be prepared and made available to public on quarterly basis, BC Docket No. 79-219, (FCC 84-67) .......... 930
Elba Development Corp.: re Review Board affirmed I.D. and denied TV application for relocation of transmitter site, BC Docket 82-763, (FCC 84R-3) .......... 376
Equipment Authorization; re *Report and Order* adopted, Gen. Docket No. 83-10, (FCC 84-21) .......... 948
FBC, Incorporated; re Review Board denied petition to re open record and enlarge issues, BC Docket No. 82-106, (FCC 83R-104) .......... 976
Florida Telephone Co.; re Commission reversed ALJ's denial on grounds of policy, fairness, etc., CC Docket No. 83-661, (FCC 84-42) .......... 980
GAF B/cing Co.: re Application dismissed and case remanded to ALJ, BC Docket 82-371, (FCC 84R-17) .......... 411
Greater Wichita Telecasting, Inc.; re Slight diversification preference given to applicant with distant CATV interests, BC Docket No. 81-103, (FCC 84-72) .......... 984
High Sierra B/cing Inc.: re Review Board affirmed ALJ's grant, BC Docket 81-637, (FCC 83R-101) .......... 423
High Sierra B/cing Inc.: re Application for CP for FM station, BC Docket 81-637, (FCC 83D-30) .......... 439
Kaldor Communications, Inc.; re Review Board directed applicant to file amendment specifying transmitter site, BC Docket No. 82-118, (FCC 84R-7) .......... 995
Kaldor Communications, Inc.; re Applications for construction permit for new FM station, BC Docket No. 82-118, (FCC 83D-36) .......... 998
KTVO, Inc.: re Review Board affirmed I.D. and granted TV application for relocation of transmitter site, BC Docket 81-326, (FCC 83R-98) .......... 472
KTVO, Inc.: re Application for modification of TV CP, BC Docket 81-326, (FCC 83D-32) .......... 483
Local Telephone Service: re Order adopted on Common Carrier Bureau's analysis of federal decisions, (FCC 83-567) .......... 491
MCI Cellular Telephone Company (Pittsburgh); re Initial Decision affirmed granting cellular nonwireline application, CC Docket No. 82-796, (FCC 84-61) .......... 1015
MCI Cellular Telephone Company (Pitsburgh); re Applications for construction permit to establish new cellular system, CC Docket No. 82-796, (FCC 83D-43) .......... 1040
Message Telecommunications Service: re Final Decision adopted, CC Docket 80-584, (FCC 83-605) .......... 522
Metro Broadcasting, Inc.; re Review Board granted appeal from ALJ's ruling, MM Docket No. 83-140, (FCC 84R-5) .......... 1069
Metro Broadcasting, Inc.; re Applications for construction permit, MM Docket No. 83-140, (FCC 83D-69) .......... 1073
Metroplex Communications of Florida, Inc.; re Substantial question of misclassification raised, MM Docket No. 84-261, (FCC 84-71) .......... 1090

MTS/WATS Market Structure; re *Order Granting Waiver* adopted, Phase I, CC Docket No. 78–72, (FCC 84–77) .......... 1103
New Continental B/cing Co.: re On remand, Review Board selected new b/c permittee, BC Docket 79–305, (FCC 83R–96) .......... 544
Old Time Religion Hour, Inc.: re Review Board denied reconsideration of Decision, BC Docket 80–445, (FCC 84R-1) .......... 551
Public B/cing Service: re Applications for national network of stations in Instructional TV Fixed Service granted, (FCC 83–611) .......... 555
Radio Jonseboro, Inc.; re Review Board reversed Initial Decision, BC Docket No. 82–641, (FCC 84R-20) .......... 1106
Radio Jonesboro, Inc.; re Applications for construction permit for new FM station, BC Docket No. 82–641, (FCC 83D–59) .......... 1115
Radio Operator Requirements; re Modification or elimination of certain Commission rules, Gen. Docket No. 83–322, (FCC 84–56) .......... 1123
Rate Integration Policies; re *NOI* adopted into appropriateness of existing rate for Alaska, Hawaii, Puerto Rico and Virgin Islands, CC Docket 83–1376, (FCC 83–606) .......... 567
Regional Concentration of Control: re *NPRM* adopted to eliminate or relax provisions of Sections 73.35(b)(1), 73.240(a)(2), and 73.636(a)(2), (FCC 84–10) .......... 578
RKO General, Inc. (KHJ-TV); Commission approved hearing procedures adopted by ALJ, Docket No. 16679, (FCC 84–26) .......... 1161
Rogers Radiocall, Inc. (Chicago); re Initial Decision affirmed, CC Docket No. 82–721, (FCC 84–62) .......... 1171
Rogers Radiocall, Inc. (Chicago); re Applications for construction permit, CC Docket No. 82–721, (FCC 83D–49) .......... 1194
San Joaquin TV Improvement Corp.: re Review Board affirmed I.D. and granted TV applicant with diversification/integration preferences, BC Docket 82–552, (FCC 83R–91) .......... 594
San Joaquin TV Improvement Corp.: re Applications for CP, BC Docket 82–552, (FCC 83D–35) .......... 605
San Joaquin TV Improvement Corp.: re Review Board denied reconsideration of FCC 83R–91, BC Docket 82–552, (FCC 84R–14) .......... 617
Section 214 Authorization: re *NPRM* adopted, (FCC 84–19) .......... 623
Service Electric Cable TV, Inc.; re Reconsideration granted in part, (FCC 84–60) .......... 1226
Smith Communications Systems, Inc.; re *Memorandum Opinion and Order* adopted, (FCC 84–30) .......... 1230
Sonic Cable TV: re Request for recission of rule violation denied, (FCC 83–570) .......... 629
Triad Broadcasting Company, Inc., WSEZ(FM); re Request for mitigation or remission of forfeiture denied, (FCC 84–68) .......... 1235
TV Programming for Children: re *Report and Order* adopted terminating proceeding, Docket 19142, (FCC 83–609) .......... 634
Ulster-American Heritage Foundation; re Complaint alleges distortion and bias news reporting, (FCC 84–69) .......... 1246
Wilson County B/c Services, Inc.: Review Board granted in part an appeal and remanded proceeding to ALJ, BC Docket 82–859, (FCC 83R–102) .......... 676
Wind River Communications, Inc.; re Review Board affirmed AJL's interlocutory ruling, Docket No. 83–763, (FCC 84R–8) .......... 1251

# Subject Digest

**Application, Dismissal of**

**Review Board granted appeal from ALJ's ruling dismissing appellant's application. Application dismissed because one of applicant's principals, a limited partner, had acquired an ownership interest in a seventh television CP, the maximum number permitted under Commission rules. Board found that limited partnership interest, if adequately insulated, would not violate multiple ownership rules. Proceeding remanded to explore control question.**

***–Metro Broadcasting, Inc.***
**MM Docket No. 83–140**

**Application, for Review**

**Denied application for review of finding that cable system is obliged to carry mandatory signal. Presumption of adequate signal not rebutted by insufficient evidence. Compliance with order issued pursuant to delegated authority mandatory absent Commission stay. Notice of apparent liability for violations of rules to be issued.**

***–Continental Cablevision of New Hampshire, Inc.***

**Application Processing of**

**Commission aproved hearing procedures adopted by ALJ to use lead attorney, but bifurcates proceeding, directs ALJ to issue partial supplemental initial decision on renewal applicant's qualifications and elaborates on scope of admissible mitigating evidence. Commission also directed staff to begin processing competing applications pending in other proceedings involving same renewal applicant.**

***–RKO General, Inc. (KHJ-TV)***
**Docket 16679**

**Attorney as Witness**

**Attorney work product doctrine protects confidentiality of an attorney's mental impressions, theories and conclusions contained in documents developed in anticipation of litigation. Work product does not protect documents prepared in course of business. An attorney witness must disclose facts pertinent to issues. Documents should be examined in camera by ALJ to determine admissibility.**

***–A.S.D. Answer Service***
**CC Docket 82–587**

**Review Board affirmed ALJ's interlocutory ruling requiring withdrawal of counsel where counsel was to be witness in proceeding. Request in opposition to appeal urging that counsel's firm also be disqualified was struck since it was, in effect, an unauthorized and untimely appeal.**

***–Wind River Communications, Inc.***
**MM Docket No. 83–763**

**Attorney, Removal From FCC Hearing**

**(See: Attorney as Witness–*Wind River Communications, Inc.*)**

Authority, Delegation of, by FCC

(See: Application, for Review–*Continental Cablevision of New Hampshire, Inc.*)

Broadcast Experience

Review Board reversed Initial Decision and awarded CP to applicant with slight comparative coverage and ownership integration preference. Latter preference based on superior qualitative enhancement credits–substantial preference for 100% local residence, moderate preference for civic participation, and slight preference for b/c experience versus substantial preference for 100% integrated minority ownership.
*–Radio Jonesboro, Inc.*
BC Docket 82–641

Business Radio Service, Frequencies

*Memorandum Opinion and Order* adopted affirming Private Radio Bureau's deletion of fifteen 800 MHz trucked channels for failure to meet loading requirements of Rule 90.366(d).
*–Smith Communications Systems, Inc.*

CATV Carriage, Mandatory Signals

(See: Application, for Review–*Continental Cablevision of New Hampshire, Inc.*)

CATV Carriage, Sports Programming

Reconsideration granted in part to clarify prior action delineating responsibilities of parties seeking sports programming blackouts.
*–Service Electric Cable TV; Inc.*

Cellular Communications Systems

Cellular applicants proposing partial settlement during comparative provedure appealed ALJ's denial of same. Commission reversed ALJ on grounds of policy, incorrect reading of precedent, and fairness. Commission encouraged settlement, in ALJ's discretion, throughout procedure, at least until release of I.D.
*–Florida Telephone Co.*
CC DOcket 83–661

Initial Decision affirmed granting cellular nonwireline application where one applicant's proposed system covers more area and population, its identification and analysis of demand was more reliable, its system design was based on its analysis of demand (slight preference for the manner it proposes to accommodate local demand) overcomes opponent's slight preference for its usage sensitive rate structure (not rate levels.).
*–MCI Cellular Telephone Company (Pittsburgh).*
CC Docket No. 82–796.

Initial Decision granting nonwireline cellular application affirmed with modifications. Judge's award of a preference for one applicant's ability to accommodate demand for roamer service and its expansion plan are reversed. Applicants will provide roamer service and their systems are capable of accommodating this demand. The applicants' expansion

plans are not set forth with sufficient detail to warrant a preference.
*–MCI Cellular Telephone Company (Pittsburgh).*
CC DOcket No. 82–796

Initial Decision granting nonwireline cellular application affirmed with modifications. Judge's finding that a fundamental principle of cellular design requires that the spacing between cells follow as uniform a pattern as possible and that one applicant's system would suffer intra-system interference in its initial configuration and as the system expands, reversed.
*–MCI Cellular Telephone Company (Pittsburgh).*
CC Docket No. 82–796.

Initial Decision affirmed granting cellular nonwireline application where one applicant's proposed system covers more area and population, its identification and analysis of demand was significantly more reliable, its system design and its proposed system will retain greater flexibility to expand in response to increasing demand overcomes opponent's slight preference for its highly usage sensitive rate structure (not rate levels).
*–Rogers Radiocall, Inc. (Chicago)*
CC Docket No. 82–721

Initial Decision granting nonwireline cellular application affirmed with modifications. Judge's award of a preference for applicant's ability to accommodate demand for roamer service reversed. No preference was warranted since both applicants will provide roamer service and their systems are capable of accommodating this demand. No preferences awarded for service offerings, maintenance and personnel proposals and one applicant's proposal for minority and consumer participation.
*–Rogers Radiocall, Inc. (Chicago)*
CC Docket No. 82–721

Initial Decision granting nonwireline cellular application affirmed with modifications. Judge's finding that fundamental principle of cellular design requires that the spacing between cells follow as uniform a pattern as possible and that one applicant's system would suffer intra-system interference in its initial configuration and as the system expands, reversed.
*–Rogers Radiocall, Inc. (Chicago)*
CC Docket No. 82–721

Civic Participation, Effect of
(See: Broadcast Experience–*Radio Jonesboro, Inc.*)

Commission
Commission by Chief, Mass Media Bureau, notified Audicom Corp. by letter that certain code signals embedded within audio program material for automatic off-air or cable transmission verification are permitted for b/cing within its policy concerning transmission of special signals. See 22 FCC 2d 779.
*–Audicom Corp.*

Common Carrier, Access Charges Distributions
*Order Granting Waiver* adopted which permits settlements to local exchange carriers that use cost studies for "line haul" and private line

functions while using average schedules for other functions.
*-MTS/WATS Market Structure*
CC Docket 78-72, Phase I

Common Carrier, Rates, Charges
The Commission proposed that all tariffs which carriers treated by forbearance in the Competitive Carrier rulemaking have on file with the Commission be cancelled and that no further tariffs be accepted for filing.
*-Common Carrier Services*
CC Docket No. 79-252

Comparative Coverage Issue
(See: Broadcast Experience-*Radio Jonesboro, Inc.*)

Comparative Criteria
(See: Cellular Communications Systems-*MCI Cellular Telephone Company(Pittsburgh)*

(See also: Cellular Communications Systems-*Rogers Radiocall, Inc. (Chicago)*

Comparative Hearing
(See: Cellular Communications Systems-*MCI Cellular Telephone Company (Pittsburgh)*

(See also: Cellular Communications Systems-*Rogers Radiocall, Inc. (Chicago))*

Competition, Common Carriers
(See: Common Carrier, Rates, Charges-*Common Carrier Services)*

Costs Allocation of
Joint Board announces basic principles and structure for NTS costs allocations, and requests furhter comments on certain limited issues. Joint Board also recommends that Commission authorize it to monitor implementation of the separations and access charge decisions.
*-Amendment of Part 67*
CC Docket No. 286

Diversification, of Control of Mass Media
Slight diversification preference given to applicant with distant CATV interests over applicant which controls tow distant TV permittees. No parttime integration credit awarded to applicant whose principal would not be at station on regular basis. No credit under best practicable service objective allowed for two limited partners who would work at station in managerial positions.
*-Greater Wichita Telecasting, Inc.*
BC Docket 81-103

Domestic Public Land Mobile Radio Service
(See: Cellular Communications Systems-*FLorida Telephone Co.*)

Equipment Authorization Program

*Report and Order* adopted amending Parts 2, 5, 15, 21, 73, 74, 78, and 94 of Rules to change type of equipment authorization needed for certain categories of equipment. This would reduce amount of information required and time spent by applicants in obtaining approval of equipment in these categories.
*–Equipment Authorization*
Gen. Docket 83–10

Evidence, Attorney Work Product
(See: Attorney as Witness–*ASD Answer Service*)

Evidence, Presumptions
(See: Application, for Review–*Continental Cablevision of New Hampshire, Inc.*)

Fairness Doctrine

Where the subject issue involves a foreign country, in order to establish a prime facie Fairness Doctrine complaint a complainant must show that the disputes involve our government's policy toward the other country or countries. Where a complainant accuses a licensee of distorting and biasing the news, the complainant must provide extrinsic evidence of such distortion and bias.
*–Ulster-American Heritage Foundation*

Forfeiture

Request for mitigation or remission of forfeiture on basis that the rule violations were all due to incorrect advice and deception of licensee's attorney/engineer denied. Commission has consistently refused to excuse licensees from forefiture penalties where action of its employees or independent contractors resulted in a rule violation.
*–Triad Broadcasting Company, Inc., WSEZ(FM)*

Foreiture
(See: Application for Review–Continental Cablevision of *New Hampshire, Inc.*)

Forfeiture, Notice of Apparent Liability
(See: Application, for Review–*Continental Cablevision of New Hampshire, Inc.*)

Frequency Coordination

Petitions for reconsideration of commission's action ordering TV station licensee to enter into formal negotiations with nearby land mobile licensees denied. Previous decision was correct and newcomer station should be required to reimburse land mobile licensees for expenses in modifying facilities to new frequencies.
*–Broadcast Corp. of Georgia (WVEU-TV)*

Frequency Efficient Use of
(See: Business Radio Service, Frequencies–*Smith Communications Systems, Inc.*)

Frequency Equitable Distribution of Under 307(b)
Larger community without its own local broadcast service is entitled to grant where population, civic and business data established it to be the more important community.
*–Affinity Communications, Inc.*
BC Docket No. 82–397

Hearing, Bifurcation of Proceedings
(See: Application, Processing of–*RKO General, Inc. KHJ-TV*)

Hearing Procedure
(See: Application, Processing of–*RKO General, Inc. KHJ-TV*)

Identification, Automatic System
(See: Commission–*Audicom Corp.*)

Identification Signal
(See: Commission–*Audicom Corp.*)

Initial Decision, Supplemental
(See: Application Processing of–*RKO General, Inc. KHJ-TV*)

Interference, Objectionable
(See: Frequency Coordination–*Broadcast Corp. of Georgia (WVEU-TV)*)

Interlocutory Ruling, Appeal From
(See: Application, Dismissal of–*Metro Broadcasting, Inc.*)
(See also: Attorney as Witness–*Wind River Communications, Inc.*)
(See also: Cellular Communications Systems–*Florida Telephone Co.*)

Issue, Enlargement of Denied
Review Board denied petition to reopen record and enlarge issues filed after Decision's release. petitioner has not shown that grantee's prinicipal was convicted of activities involving moral turpitude (e.g., fraud), therefore, addition of character issue not justified and contrary to precedent.
*–FBC, Incorporated*
BC Docket 82–106

Issues/Program List
Commission determined that the issues/programs list, currently required to be placed annually in the public file of a commercial radio braodcast station, should instead be prepared and made available to the public on a quarterly basis. the Commission also concluded that the existing limitation on the number of issues that may be included on the list should be removed.
*–Deregulation of Radio*
BC Docket No. 79–219

Commission no longer requires the commercial radio licensee to describe in the issues/programs list how it determined each issue to be one facing its community.

*–Deregulation of Radio*
BC Docket No. 79–219

**Joint Boards**
(See: Costs, Allocation of–*Amendment of Part 67*)

**Local Residence**
(See: Broadcast Experience–*Radio Jonesboro, Inc.*)

**Minority Ownership, Factor in Comparative Proceeding**
(See: Broadcast Experience–*Radio Jonesboro, Inc.*)

**Misrepresentation, Employment Practices**
Substantial question of misclassification raised when specific evidence exists that an employee's duties and responsibilities would not place that person in the employment category indicated by the licensee, and it appears that the misclassification was intended to deceive the Commission as to the effectiveness of the station's EEO program.
*–Metroplex Communications of Florida, Inc. WHYI(FM)*
MM Docket No. 84–261

**Mitigating Evidence, Generally**
(See: Application, Processing of–*RKO General, Inc. KHJ-TV*)

**Mobile Radio Service, Cellular**
(See: Cellular Communications, System–*Florida Telephone Co.*)

**Mobile radio Service, Cellular Applications**
(See: Cellular Communications Systems–*MCI Cellular Telephone Company (Pittsburgh)*

(See also: Cellular Communications Systems–*Rogers Radiocall, Inc. (Chicago)*

**Motion to Strike**
(See: Attorney as Witness–*Wind River Communications, Inc.*)

**News Deceptive, Slanted, Distorted**
(See: Fairness Doctrine–*Ulster-American Heritage Foundation*)

**Notification**
(See: Equipment Authorization Program–*Equipment Authorization*)

**Operater Requirements**
Modification or elimination of certain commission rules that require licensed commercial radio operators in the Experimental, International, and Auxiliary Broadcast Services; elimination of the requirement that licensed commercial radio operators perform certain duties in the Private Radio, Domestic Public Fixed, and Cable Television Relay Services; and changes in commercial radio operator licensing procedures and policies.

*–Radio Operator Requirements*
Gen. Docket No. 83–322

Orders, Clarification of
(See: Application, Processing of–*RKO General, Inc. KHJ-TV*)

Ownership and Management, Integration of
(See: Diversification, of control of Mass Media–*Greater Wichita Telecasting, Inc.*)

Ownership, Multiple,
(See: Application, Dismissal of–*Metro Broadcasting, Inc.*)

Ownership, Multiple, Factor in Application
(See: Diversification, of Control of Mass Media–Greater Wichita Telecasting, Inc.)

Public Inspection of Local Station File
(See: Issues/Program List–*Deregulation of Radio*)

radio Frequency Device, Authorization
(See: Equipment Authorization Program–*Equipment Authorization*)

Radiotelegraph Operator
(See: Operater Requirements–*Radio Operater Requirements*)

Radiotelephone Operater Requirements
(See: Operater Requirements–*Radio Operater Requirements*)

Reconsideration, Petition for, Denial of
(See: Frequency Coordination–*Broadcast Corp. of Georgia (WVEU-TV)*)
(See also: Issue, Englargement of, Denied–*FBC, Incorporated*)

Reconsideration, Petition for, Grant of
(See: CATV Carriage, Sports Programming–*Swervice Electric Cable TV, Inc.*)

Rules, Exemption from
(See: Business Radio Service, Frequencies–*Smith Communications Systems, Inc.*)

Rules, Failure to Conform
(See: Business Radio Service Frequencies–*Smith Communications Systems, Inc.*)

Separation Procedure
(See: Costs, Allocation of–*Amendment of Part 67*)

Settlement
(See: Cellular Communications Systems–*Florida Telephone Co.*)

**Severance**
**Review Board denied petition to enlarge seeking transmitter site availability and related issues because request based on hearsay. Board noted that applicant had in fact lost its site but declined to add an issue because the applicant was actively seeking to secure a new site.**
**–*Alan K. Levin***
**BC Docket No. 80–712**

**Site Availability**
**Review Board directed applicant to file amendment specifying new transmitter site, where motion to enlarge issues show that new owner of present site does not intend to make it available and applicant's only recourse is a lawsuit to enforce lease option on the site.**
**–*Kaldor Communications, Inc.***
**BC Docket 82–118**

**(See also: Severance–*Alan K. Levin*)**

**Tariffs**
**(See: Common Carrier, Rates, Charges–*Common Carrier Services*)**

**Tariff, Filing and Posting of**
**(See: Common Carrier, Rates, Charges–*Common Carrier Services*)**

Frequency, Equitable Distribution of Under 307(b)

Larger community without its own local broadcast service is entitled to grant where population, civic and business data established it to be the more important community.
–*Affinity Communications, Inc.*
BC Docket No. 82-397

FCC 84R-24

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| In re Applications of | |
|---|---|
| AFFINITY COMMUNICATIONS, INC.<br>Colusa, California | BC Docket No. 82–397<br>File No. BPH-810323AH |
| SACRAMENTO VALLEY RADIO, INC.<br>Williams, California | BC Docket No. 82–398<br>File No. BPH-810818AL |
| For Construction Permit for a New FM Station | |

*Appearances*

*George Malti* on behalf of Affinity Communications, Inc.; *Christopher J. Reynolds* on behalf of Sacramento Valley Radio, Inc.

## DECISION

(Adopted April 12, 1984; Released: April 19, 1984)

BY THE REVIEW BOARD: MARINO (Chairman), JACOBS, BLUMENTHAL.

BOARD CHAIRMAN MARINO:

1. This is a comparative broadcast case to establish a new FM station in either Colusa or Williams, California. It reaches us after a trial-type hearing and a comprehensive Initial Decision, FCC 83D-58, released October 20, 1983, by Acting Chief Administrative Law Judge Fitzpatrick. In their briefs the applicants have narrowed the question before us to whether Colusa, the larger community without its own local radio service, is entitled to a grant pursuant to 47 U.S.C. 307(b). The Chief ALJ correctly applied well settled precedent in preferring the community of Colusa, and his conclusion is firmly

supported by *Cornwall Broadcasting Corp.*, 89 FCC 2d 704, 51 RR 2d 389 (Rev. Bd. 1982), and other authorities.[1]

2. Section 307(b) mandates a fair, efficient and equitable distribution of radio service among competing communities. See authorities cited in *Beaufort County Broadcasting Co.*, 94 FCC 2d 572, 575, 54 RR 2d 923, 925 (Rev. Bd. 1983). Here there is no dispute that the 307(b) issue is decisive (Sacramento's Br. p. 5; Affinity's Reply p.3); rather, the question presented is which community is entitled to a grant under controlling Section 307(b) principles.

3. Colusa, population 4075, and Williams, population 1655, are the only two cities in Colusa County, population 12,791. Neither community has its own local station. Colusa is the county seat in which are located the courthouse, library, health and welfare building, and the offices of sheriff and supervisors. Some 46% of the retail establishments of the county and more than half of all retail sales are in Colusa. Sacramento, Br. 6. Colusa was selected in the Initial Decision as the preferred community because it presently does not have a local radio station, it is the larger community, and it was acknowledged that Colusa's governmental importance surpassed Williams. Sacramento's contention that the commercial activity radiating from Williams throughout the county is of greater significance and therefore justifies a grant to that community was rejected by the ALJ. I.D. Conclusions, paras. 2–4.

4. Sacramento's brief states that the essence of its position "is that the city of Williams is the hub for all distinctive activities of Colusa County—agricultural and related industries, transportation, and outdoor recreation, including hunting, fishing, hiking and camping. The fact that Colusa is designated the county seat—probably bestowed on it during the days when navigable rivers were the sole mode of domestic commercial traffic—and the 'superiority' of its retail, wholesale and service industry statistics are insufficient to overcome the importance of Williams to the surrounding area in Colusa County." Br. 4–5, Affinity replies on behalf of Colusa that there is a long-standing presumption in favor of the larger community without a local broadcast service of its own; that the presumption in favor of Colusa was not offset by othe circumstances; and that "There is no evidence in the record, and none was attempted to be introduced, of service by any existing stations to Colusa." Thus, the ALJ correctly applied Commission law and precedent. Reply pp. 3–5.

5. Sacramento cites no authority which weakens the strong legal principle or presumption that the larger community without its own local broadcast service is entitled to a grant. Here the legal presumption in favor of Colusa is reinforced by the record which

---

[1] The one issue before us is straightforward, and oral argument would not aid our resolution of this case. Accordingly, we deny Sacramento's request for oral argument, which Affinity opposed. *See Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018, 50 RR 2d 115 (Rev. Bd. 1981).

establishes that Colusa's population is nearly 2 ½ times more than Williams. Colusa contains nearly a quarter of the population in the county, and is the county seat. Thus, this case is squarely controlled by *Cornwall Broadcasting Corp.*, *supra* where the Board held:

> **Hudson is the substantially larger community having approximately 2 ½ times the population of Zumbrota according to 1980 Census figures. Neither community currently has a commercial broadcast facility or any service licensed to it. Because not every community in the nation can yet have a station, the Commission has logically chosen to effectuate Section 307(b) by traditionally preferring that community having no licensed outlet which is larger by population and by concomitant social and business structures indigenous, and necessary, to support that population, including broadcast service. It is hard to imagine, as a matter of Section 307(b) principle, that the agency could do otherwise, absent compelling circumstances. The longstanding presumption in favor of the larger community without a local broadcast service licensed to it is firmly engrained in Commission policy, illustrative of which is *Du Page County Broadcasting, Inc.*, 19 FCC 2d 250, 253–254 (Rev. Bd. 1969) . . . .**

89 FCC 2d at 709.

6. Sacramento's argument is based on three cases, Br. 14–16, which do not support its position. *Five Cities Broadcasting Co.*, 35 FCC 501 (Rev. Bd. 1963), and *Du Page*, *supra*, followed the traditional policy and preferred the larger communities. In *Radio Haddonfield, Inc.*, 37 FCC 168 (Rev. Bd. 1964), the larger "suburban" community was not preferred because it was overshadowed by a dominant nearby city; moreover, to the extent that *Radio Haddonfield*, 37 FCC at 170, relied on *Monroeville Broadcasting Co.*, 35 FCC 657, 1 RR 2d 607 (1963), Monroeville was subsequently reversed in *Miners Broadcasting Service, Inc.*, v. *FCC*, 349 F.2d 199 (D.C. Cir. 1965), and the Commission has now abondoned the "suburban" community policy. *See Suburban Community Policy*, 93 FCC 2d 436, 53 RR 2d 681 (1983), *see also Beaufort County*, *supra*, 94 FCC 2d at 576, paras. 10–11. Accordingly, we affirm the Initial Decision which correctly applied controlling Commission policy, principles, and precedents in granting the application which proposed to serve the larger preferred community of Colusa. In sum, *Cornwall* is dispositive. The fact that Williams, as alleged, may be the agricultural center of the county does not overcome the larger community's strong presumption of need, which is firmly buttressed by population, business, and civic data presented in this case. See *Harrell* v. *FCC*, 267 F.2d 629, 18 RR 2072 (D.C. Cir. 1959).

7. On March 2, 1984, Sacramento filed a motion to reopen the record and remand the proceeding alleging that the Commission recently proposed a new FM channel assignment to Colusa, California. The motion was opposed by Affinity on March 26, 1984. This motion will be denied because it does not establish that the facts relied on, even if true, would affect the ultimate decision. *See KFPW Broadcasting Co.*, 44 FCC 2d 310, 28 RR 2d 1644 (1973). Sacramento relies on a *Notice of Proposed Rule Making*, FCC 84–66, released

March 14, 1984, (BC Do. No. 80–90), in which the Commission listed 684 communities, including Colusa, as proposed locations for new FM channel assignments, set forth procedures for the filing of comments and counterproposals, and stated that upon completion of the proceeding it would issue a Report and Order allotting channels to selected communities. *Id.*, paras. 1, 11 and 16. Thus, no new channel has yet been assigned to Colusa, let alone any application been filed for such an assignment, and the central fact in this proceeding remains that neither Colusa nor William has any existing or authorized stations at the present time. Our review must rest on the current facts of record and cannot be based on hypothetical future developments.

8. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend, file January 19, 1984, by Affinity Communications, Inc. IS GRANTED and the amendment IS ACCEPTED; and

9. IT IS FURTHER ORDERED, That the motion to reopen the record and to remand the proceeding, filed March 2, 1984, by Sacramento Valley Radio, Inc., and its motion to strike filed January 6, 1984, ARE DENIED; and

10. IT IS FURTHER ORDERED, That the application of Affinity Communications, Inc. (File No. BPH-810323AH) for a new FM broadcast station at Colusa, California IS GRANTED and the application of Sacramento Valley, Radio, Inc. (File No. BPH-810818AL) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

FCC 83D–58

BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| AFFINITY COMMUNICATIONS, INC.<br>Colusa, California | BC Docket No. 82–397<br>File No. BPH-810323AH |
| SACRAMENTO VALLEY RADIO, INC.<br>Williams, California | BC Docket No. 82–398<br>File No. BPH-810818AL |
| For Construction Permit for a New FM Station | |

## *Appearances*

*George Malti* on behalf of Affinity Communications, Inc.; *Harry J. Ockershausen* and *Christopher J. Reynolds* on behalf of Sacramento Valley Radio, Inc.; and *Daniel Sarno* and *Stephen Yelverton* on behalf of the Mass Media Bureau, Federal Communications Commission.

# INITIAL DECISION
# OF
# ASSISTANT CHIEF ADMINISTRATIVE LAW JUDGE THOMAS B. FITZPATRICK

(Issued: October 14, 1983; Released: October 20, 1983)

## *Preliminary Statement*

1. This proceeding involves the mutually exclusive applications of Affinity Communications, Inc. (Affinity) and Sacramento Valley Radio, Inc. (Sacramento) for a construction permit to operate a new FM broadcast station on Channel 298 at Colusa, California and Williams, California, respectively. by *Hearing Designation Order* (BC 5195), 47 Fed. Reg. 32611, published July 28, 1982, the Commission, by the Chief, Broadcast Bureau, acting pursuant to delegated authority, designated the applications for hearing on the following issues:

(1) To determine the areas and populations which would receive primary aural service (1 mV/m or greater) from the proposals and the availability of other primary service to such areas and populations;

(2) To determine, in the light of Section 307(b) of the Communications Act of

1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service;

(3) To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis, better serve the public interest;

(4) To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. By *Memorandum Opinion and Order* (FCC 82M-3017), released September 29, 1982, the Presiding Judge enlarged the issues to include the following:

> To determine, in the event it is concluded that Section 307(b) is determinative and that Colusa has the greater need for a first local broadcast outlet, whether a waiver is warranted of 47 CFR 73.1125 and 73.1130, as it relates to the proposal of Sacramento Valley Radio, Inc.

3. A prehearing conference was held on September 20, 1982, and the hearing was held in Washington, D.C. on December 14, 1982, at which time the record was closed. Affinity and Sacramento filed Proposed Findings of Fact and Conclusions of Law on January 20, 1983 and January 21, 1983, respectively. They filed Reply To Findings on February 18, 1983.

## *Findings of Fact*

### A. *The 307(b) Issue*

### (a) *Comparative Coverage—Other Aural Services*

4. Affinity and Sacramento propose to construct and operate a new Class B FM station on Channel 298. Affinity proposes to operate with 27.8 kw ERP (H&V) at 630 feet HAAT. Sacramento proposes to operate with 29.5 kw ERP (H&V) at 650 feet HAAT. Both applicants propose the same antenna site. The slight difference in effective radiated power and height above average terrain results in no significant difference in the proposed coverage. The areas and populations which would receive primary aural service (1 mV/m or greater) and the availability of other primary service to those areas and populations are virtually the same for the two proposals.

5. Both of the applicants provide a city-grade (3.16 mV/m) signal to Colusa and Williams. (Joint Ex. 1, pp. 1–2)

6. There is no FM or AM station presently assigned to either Colusa or Williams. Colusa and Williams are both located in Colusa County. There are no FM or AM stations located in Colusa County. (Joint Ex. 1, p. 2)

7. There are at least five authorized primary aural reception services available day and night, to both Colusa and Williams. These are listed below (Joint Ex. 1, p. 2):

| *Station* | *Location* | *Facilities* |
|---|---|---|
| KRFD (C.P.) | Maryville, CA | Ch. 260B, 2 kw, 2003 Ft. |
| KRAK | Sacramento, CA | 1140 kHz, 50 kw, DA-1 |
| KFBK | Scramento, CA | 1530 kHz, 50 kw, DA-1 |
| KNBR | San Francisco, CA | 680 kHz, 50 kw |
| KGO | San Francisco, CA | 810 kHz, 50 kw, DA-1 |

8. As shown in its application for construction permit, the authorized FM station, KRFD, provides a signal of at least 1 mV/m to both Colusa and Williams. (Joint Ex. 1, p. 2)

9. The AM Class 1B stations (KFBK, KNBR and KGO) provide a signal of at least 2 mV/m day and night to both Colusa and Williams. AM station KRAK provides a daytime signal of at least 2 mV/m and a nighttime-interference free signal of at least 3.8 mV/m to both communities. (Joint Ex. 1, p. 2)

(b) *The Communities*

(1) *Colusa*

10. Colusa is located in Colusa County along the banks of the Northern Sacramento River on State Highway 20, ten miles from Interstate 5, approximately 50 miles north of Sacramento. The City of Colusa had a 1980 population of 4,075 and is the county seat of Colusa County.[1] (Affinity Ex. 11, p. 1)

11. Taxable sales of $51,610,000, or approximately 43% of the $119,509,000 taxable sales in Colusa County in 1981, were made in the City of Colusa.[2] (Affinity Ex. 11, p. 1)

12. The 1977 U.S. Bureau of Census Reports, the latest such reports published by the Bureau, contain the following facts (Affinity Ex. 11, p. 2):

(a) 46% (72 of 155) of the retail establishments in Colusa County were located in Colusa.[3]

(b) Over 52% of the retail sales ($16,880,000 of $32,216,000) in the County were made in Colusa.[3]

(c) Over 48% of the paid employees (304 of 625) in the County's retail trade worked in Colusa.[3]

(d) There were 11 retail businesses in Colusa County in 1977 dealing in the categories of building materials, hardware, garde supplies and mobile homes. Of these, 7 were located in Colusa and $1,437,000 of the $2,106,000 of retail sales in this category were made in Colusa.[3]

(e) There were 15 automotive dealers in Colusa County in 1977. Of these, 6 were located in Colusa. The Colusa dealers transacted $2,837,000 of the total County sales of $3,939,000 in this category.[3]

---

[1] This represents a 5.96% increase from the 1970 population of 3,842. Colusa County had a 1980 population of 12,791. (Affinity Ex. 11, p. 6)

[2] State Board of Equalization, Statistical Research and Consulting Division. (Affinity Ex. 11, p. 6)

[3] U.S. Bureau of Census, 1977 Census of Retail Trade. (Affinity Ex. 11, pp 7–8)

(f) Over 73% of the wholesale trade establishments (19 of 26) in the County were located in Colusa.[4]

(g) Over 62% of the Service Industries (80 of 128) in the County were located in Colusa.[5]

(h) Over 68% of the receipts from service industries in the County ($3,096,000 of $4,509,000) were in Colusa.[5]

(i) Nearly 71% of the paid employees in service industries in the County (105 of 148) were employed in Colusa.[5]

13. Approximately 87% of all amusement and recreational establishments in the County (13 of 15) were located in Colusa.[5] (Affinity Ex. 11, p. 2)

14. All ten (10) attorneys in Colusa County were located in Colusa.[5] (Affinity Ex. 11, p. 3)

15. The Colusa National Wildlife Refuge is located within the city limits of Colusa, and a marina with sheltered harbor and berth facilities for cabin cruisers is located a mile north of the city limits.[6] (Affinity Ex. p. 2)

16. There are four public parks, a public swimming pool, tennis courts and a municipal golf course in Colusa.[6] (Affinity Ex. 11, pp. 2–3)

17. Colusa has the only general hospital in Colusa County[7], and is served by 10 doctors, 2 dentists, an orthodontist, a chiropractor, and a veterinarian.[6] (Affinity Ex. 11, p. 3)

18. All of the following governmental institutions are located in Colusa (Affinity Ex. 11, p. 3):[7]

(a) County courthouse
(b) County library
(c) County sheriff
(d) County health and welfare building
(e) County fairgrounds

19. Colusa County has one Superior Court judge, one Municipal Court judge, and a District Attorney's office, all located in Colusa. The County Board of Supervisors' offices are located in Colusa. (Affinity Ex. 11, p. 3)

20. The City of Colusa is governed by a five person council, which includes a mayor. It has full-time police and fire departments. It is served by one public high school, a junior high and an elementary

---

[4] U.S. Bureau of Census, 1977 Census of Wholesale Trade. (Affinity Ex. 11, p. 9)

[5] U.S. Bureau of Census, 1977 Census of Service Industries. (Affinity Ex. 11, p. 10) Richard Green testified that one attorney is located a mile or a mile and a half south of Williams. (TR 147)

[6] Colusa Chamber of Commerce. (TR 73–76)

[7] Subject of Request for Admissions and deemed admitted pursuant to Section 1.246 of the Rules, 47 CFR 1.246. (Affinity Ex. 11, p. 6)

school. It is located in the Yuba Community College District.[6] (Affinity Ex. 11, p. 3)

21. Colusa has chapters of many service, fraternal, women's and youth organizations, including, but not limited to, Rotary, Little League, Children's Home Society, Women's Club, 4-H Club, Lions, and Moose. Thirteen churches are located in Colusa. Bank of America and Crocker National Bank, Heart Federal Savings and Loan and Colusa-Glenn Production Credit Association serve the financial needs of the City.[6] (Affinity Ex. 11, pp. 3–4)

22. Colusa is not served by any local transmission broadcast outlet. There is a daily newspaper. (Affinity Ex. 11, p. 4)

2. *Williams*

23. The City of Williams is located in Colusa County. The 1980 population of Williams was 1,655. (Affinity Ex. 11, p. 1)[8]

24. The number of housing units in Williams totals 631, an increase of 14.7% over the 1970 figure of 550.[9]

25. Williams is governed by a five-member City Counsel, one of whom is elected Mayor. Water, sewer and refuse removal services are provided by the City. A fulltime Police Department and a volunteer Fire Department serve the City. (Sacramento Ex. 5, p. 1; TR 135)

26. There are six churches located in Williams. Civic, fraternal, trade and charitable clubs and organizations include the Williams Civic Association, the Colusa County Farm Bureau, Kiwanis, Masons, Heart Fund Memorial and the Police Officers Association. (Sacramento Ex. 5, p. 1) The Chamber of Commerce serving Williams is located in Colusa. (Sacramento Ex. 5, p. 2)

27. Williams is served by one public high school (enrollment 167), one elementary school (enrollment 404), and is part of the Yuba Community College District. The city has two public parks, a public swimming pool and is the home of the Sacramento Valley Museum. City and County offices located in the city include the City Hall, Police Department, County Road Department, Public Library and Justice Court. State of California offices include the Colusa County Office of the California Highway Patrol and the California Department of Transportation maintenance stations.

28. The city is served by two doctors, two dentists, one veterinarian, and the Valley West Convalescent Hospital for geriatric and rehabilitative care.

29. Pacific Gas and Electric Company supplies natural gas and electricity. C.P. National provides phone service. A weekly newspaper, "Colusa County Farmer," has offices in Williams but is

---

[8] This represents an 5.3% increase over the 1,571 population of 1970.

[9] The number of housing units in Colusa increased from 1,335 to 1,649, an increase of 23.5%. (Sacramento Ex. 10, p. 3)

published and printed in Willows, a town some 30 miles north of Williams and outside of Colusa County. (Sacramento Ex. 5, p. 2)

30. The taxable sales in Williams in 1981 were $11,633,000.[10] This represents 9.7% of the Colusa County taxable sales of $119,509,000. (Affinity Ex. 11, p. 4)[11]

31. According to the California State Board of Equalization in its quarterly report on "Taxable Sales in California," from the first quarter of 1980 to the first quarter of 1982, the total retail sales in Williams grew 7.8% from $1,982,000 to $2,137,000, while those for Colusa grew 9.8% from $5,347,000 to $5,871,000. (Sacramento Ex. 10, pp. 6–7, 10–11)

32. Sacramento claimed that the number of businesses operating in or immediately adjacent to Williams totals 190, including the following: 5 apparel stores; 4 general merchandise; 1 drug store; 1 packaged liquor store; 15 eating and drinking establishments; 13 building materials/farm implements; 8 auto dealers/parts and supplies; 7 service stations; 9 other retail; 6 food stores; 6 farm supplies stores; 15 insurance/real estate; 9 truck-repair and service; 6 beauty/barber shops; 4 recreation outlets; 9 hotel/motel/trailer courts; 11 contractors/building and other; 7 professional services; 4 furniture/appliance repair; 2 transportation services; 19 manufacturing/processing wholesale; 6 agricultural air services; 2 banks; 3 newspaper/printing; 2 health care services; 4 water/power/sewer; 4 warehousing/storage and 2 funeral/cemetery services. (Sacramento Exs. 5, pp. 2–3, 12; TR 146–153)

33. Sacramento's Exhibit 12 contains a list of all busineses, professional organizations, federal, state, county and city offices and buildings in "Williams and vicinity." This list of businesses includes taxable and non-taxable retail outlets. (TR 135). Richard Green, vice president and director of Sacramento, explained that in preparing the list, he calculated the "vicinity of Williams" as being within a few blocks radius around the entire city. (TR 138) However, it was established that some of the businesses listed as being in the vicinity are not immediately adjacent to Williams but are outside the city limits by as much as two miles. (TR 149–150)

34. Green was unable to state with certainty that all of the listed businesses were "operating". They appeared to him to be operating. He did not speak with the proprietors of each business and had no personal knowledge. (TR 138)

35. The list of businesses set forth in Sacramento's Exhibit 12 contains two or three mentions of a single business in multiple categories.

---

[10] The taxable sales in Colusa for 1981 were $51,610,000, or approximately four and one-half times greater. (Affinity Ex. 11, p. 4)

[11] The retail, wholesale and service industries in Williams are not reported in the U.S. Bureau of Census reports cited, *supra*. (Affinity Ex. 11, p. 5)

36. The following businesses listed in Sacramento's Exhibit 12 are not identified with respect to locale, and Green did not elucidate on their distance from Williams:

(1) C & L Pest Control (p. 1)
(2) Bagley Heating and Air Conditioning (p. 1)
(3) Valley Masonry (p. 4)
(4) Ray Bickford (p. 4)
(5) Andreotti's Shop (p. 4)
(6) Sommerville (p. 4)
(7) Plan and Plank (p. 5)
(8) S & W Thrashing (p. 5)
(9) All 13 names under the category "Ranches" (p. 8)
(10) Musser Seed Company, Inc. (p. 9)
(11) Jerry's Truck Service (p. 9)
(12) Spooner Drier (p. 10)
(13) Williams Warehouse (p. 10)
(14) M. W Cheney Shop (p. 10)
(15) Jewett Farms Shop (p. 10)
(16) M & K Farms Shop (p. 10)
(17) Vann Brothers Shop (p. 10)

37. If duplicated and triplicated listings, educational, religious, civic, governmental, and other public institutions and utilities, and private ranches and their service shops are removed from Sacramento's Exhibit 12 listings, the resulting businesses appearing to Mr. Green to be operating within the Williams city limits approximate 109.[12]

38. The City of Williams is located in the center of Colusa County at the crossroads of Interstate 5, the only major North-South route through the county, and State Route 20. Agricultural products are the economic base of the county and Williams is the transportation hub for the county, serving tourist and commercial traffic with motels and restaurants, as well as serving as the center for agriculture produce processing, storage and transportation in and out of the agricultural areas of the county. (Sacramento Ex. 6, p. 1)

39. Within or adjacent to the City of Williams, eight trucking firms have located their base of operations and account for a large portion of the traffic generated at Williams. The Southern Pacific Rail Line runs through the city, parallel to Interstate 5, and provides a vital transportation link for the agricultural related industries located throughout the county. (Sacramento Ex. 6, p. 1)

40. Colusa County is the leading rice-producting county in the United States, and many business activities are related to this crop, including drying and storage facilities. The Rice Growers Association

---

[12] Affinity's request for official notice of Taxable Sales In California (Sales and Use Tax), 1980-First Quarter and 1982 First Quarter, published by the California State Board of Equalization is denied. The Presiding Judge in his *Order Prior to Prehearing Conference* (FCC 82M-2337), released July 30, 1982, ruled that if official notice was to be requested, the material should be offered as an exhibit.

has two storage facilities in Williams and DePue Warehouses has one large storage facility.[13] The bulk of the rice grown in the area is shipped to Sacramento by truck via Interstate 5. Other Williams area businesses include Ag-Fiberglass, Sacramento Valley Milling Company (a bean processing plant which dries and bags beans and ships the product by truck via Interstate 5), Colusa County Farm Supply, Cheney Seed Plant, Endemans Feed and Pellet Mill and numerous farm operations. Other crops produced in the county include tomatoes, prunes, wheat, sugar beets, almonds, barley, safflower, alfalfa hay, sorghums and vine seed crops. The vine seed crops include melons, cucumbers and beans, and major growers include Moran Food Machinery, Haller and Pietro Seed. The seeds are harvested, dried, cleaned and shipped by truck via Interstate 5 to Stockton and the San Joaquin Valley. (Sacramento Ex. 6, pp. 1-2)

41. The new Tehama-Colusa Canal which runs in a north-south direction through the heart of the agricultural district of the county is located immediately west of the City of Williams, and is rapidly changing the nature of the crops being produced on the west side of the valley from the former "dry crop" production to "row crops," and orchards. The canal will provide irrigation for the first time to some 75,000 acres of land. Approximately 50% of all row crops for seed in the county are in the Williams area. This change to "row crops" is resulting in a higher dollar volume of production as well as increased land values. Some 5,000 acres have recently been converted into tomato productionk, supplying tomatoes to the recently established NAAS Food Corporation Colusa Canning Companies plant located about a mile and a half from the City of Williams. (TR 148) This plant processes tomatoes into pulp which is then shipped via Southern Pacific Railway tank cars to Indiana. This plant not only has resulted in increased rail activity, but also increased trucking with the Ram Trucking firm now operating out of the Williams area transporting the tomato crop from the grower to the processing plant. Other development taking place as a result of the water supply from the Tehama-Colusa Canal includes some 4,000 - 5,000 acres of land placed into production with almond orchards. There are also approximately 100 acres of wine grapes near Williams which are harvested and shipped by truck via Interstate 5 to the San Joaquin Valley. (Sacramento Ex. 6, pp. 2-3)

42. Additional agricultural related facilities are either under construction in the area or in the planning process. These include expansion of the drying and storage facilities at DePue Warehouses; construction of a 12 million dollar power generating plant to be located adjacent to the Colusa Canning Company plant, which will utilize rice hulls and orchard trimmings as its source of fuel; and a

---

[13] Green contradicted this testimony when he acknowledged that the DePue Warehouse was the only one physically located within Williams. (TR 152)

wood shavings processing plant to be located west of the City of Williams utilizing forest products converted into wood shavings for use in stables and other related areas. (Sacramento Ex. 6, pp.3-4)

43. Floyd Myers "Bud" Marsh's (Marsh), Colusa County Supervisor for District 3, which encompasses Williams, view that Williams is the service center for tourists, commercial traffic and sportsmen is not supported by the record. While Motel 6 opened a new motel and the VIP Restaurant were opened within the last two years, the U.S. Bureau of Census, 1977 Census of Services Industries reported that the city of Colusa, at that time, had 8 of the 17 hotel-motel facilities in Colusa County. (Affinity Ex. 11, p. 10)

### (3) *Colusa County*

44. The 1980 U.S. Census population of Colusa County was 12,791, an increase of 2.5 percent over 1970.

45. In addition to the two incorporated cities, Colusa and Williams, the other principal unincorporated towns of Colusa County are Arbuckle in the almond-growing district, Maxwell in the heart of the rice-growing area, Grimes and Princeton on the Sacramento River in the prune, walnut and general farming area, and Stonyford, the headquarters for the mountain recreation area. Other small towns in the county include College City, Sites, Ladoga and Delevan. (Sacramento Ex. 5, p. 7)

46. Colusa County offers a variety of outdoor recreational opportunities which contribute to the Colusa County economy, and includes camping and hiking, deer hunting and lake and stream fishing on the Stonyford Ranger District which covers some 146,500 acres of land in the Northwestern section of Colusa County. Ducks, geese, pheasants, quail and doves on the rice lands in the county provide hunting opportunities for game bird hunters. The Sacramento River is a source for salmon, steelhead and bass fishing, as well as water skiing and power boat cruising (the latter also on the East Park Reservoir). (Sacramento Ex. 5, pp. 6–7)

47. Three of the four complexes of the National Wildlife Refuges in the Sacramento Valley are situated in Colusa County. These refuges constitute about 23,000 acres and are a major wintering area for migratory watefowl of the Pacific Flyway. (Sacramento Ex. 5, p. 7)

## B. *The Applicants*

### (a) *Affinity Communications, Inc.*

### (1) *Integration*

48. Affinity is a California corporation having one class of stock, common, with no par value. 100,000 shares are authorized of which 20,000 are issued. The officers, directors, and shareholders of Affinity are as follows (Affinity Ex. 1):

| | | |
|---|---|---|
| Peter Mieuli<br>President, Director | 10,000 shares | 50%<br>ownership |
| Michael E. Marquardt<br>Secretary-Treasurer, Director | 10,000 shares | 50%<br>ownership |
| Diane D. Marquardt[14]<br>Director | | |
| Susan Mieuli[14]<br>Director | | |

49. Michael E. Marquardt (Marquardt) will be the full-time General Manager of the proposed FM station, and a resident of the service area. He will devote a minimum of 40 hours per week to the station. (Affinity Ex. 7, pp. 1–2)

50. Marquardt currently resides in Newark, California. He is 41 years of age and is married with three children, two of whom are adults and are pursuing careers, and the youngest is 15 years old. (Affinity Ex. 2, p. 1)

51. Marquardt was born in Oakland, California and attended elementary and secondary schools in the Oakland Public School District. During the summer months, while Marquardt was a junior and senior in high school, he was employed as an electrician's apprentice, working on construction projects. This job required joining the Electrical Workers Union, an affiliation that continued until 1976, when Marquardt took a withdrawal to join the National Association of Broadcast Engineers and Technicians Union. During his high school years, Marquardt formed a sound company specializing in providing public address equipment for weddings, bar mitzvahs and fraternal gatherings. He graduated from Castlemont High School in January, 1959. (Affinity Ex. 2, pp. 1–2)

52. Marquardt enrolled in Oakland City College, majoring in radio communications. The subjects of his studies included engineering theory, FCC rules and regulations, studio operations, announcing, and FCC licensing. (Affinity Ex. 6, p. 1)

53. In May 1960, Marquardt was hired on a part-time basis by radio Station KHYD-FM in Fremont, California. The station had recently been put on the air, and Marquardt was exposed to the problems and difficulties in building a radio station. Because of his experience with providing public address systems, Marquardt was put in charge of setting up weekly church service remotes that were aired on the radio station. He also provided this same service for a number of retail stores and nightclubs. In addition to providing engineering for the KHYD-FM's remotes, Marquardt also sold

---

[14] Peter and Susan Mieuli are husband and wife, as are Michael and Diane Marquardt. (Affinity Ex. 1)

advertising and worked as on-air talent and assisted the station's chief engineer in maintenance and repair of the transmitter. While working part-time at radio Station KHYD-FM, Marquardt also worked for Pacific Electric Motor Manufacturing, assembling regulated power supplies for nuclear accelerators. (Affinity Ex. 2, p. 3; Affinity Ex. 6, p. 1)

54. In July 1962, the owners of Station KHYD-FM sold the station and purchased radio station KHIP-FM in San Francisco. Marquardt was responsible for learning the technical side of the operation of Station KHIP-FM and was put in charge of converting the station into a stero operation and setting up new studio facilities. He continued to work at radio Station KHIP-FM (later changed to call letters KMPX) on a part-time basis until March 1964. During those years, he was responsible for moving and re-designing the studios on three separate occasions. He also sold advertising and worked as on-air talent and continued to engineer radio remotes for the station. he recreated major sports events with sound effects, and edited and announced news. (Affinity Ex. 2, p. 3; Affinity Ex. 6, p. 2)

55. In August 1962, Marquardt was hired by Franklin Mieuli and Associates to work in the company's in-house audio tape duplicating facility, Hi-Speed Tape Duplicating Company (Hi-Speed). The duplication facilities were originally set up to provide duplication and distribution of sports programming as produced by Franklin Mieuli and Associates. (Affinity Ex. 2, p. 3)

56. Soon after Marquardt became employed at Hi-Speed, he worked to expand the business to the recording and duplication of radio commercials and the distribution of a number of non-sports syndicated radio programs, including the Commonwealth Club of California, which is still numbered as an account of Hi-Speed. The Commonwealth Club account involves the recording, editing, duplicating and distributing of the weekly club meetings, held in San Francisco. The Commonwealth Club meets weekly and presents speakers from a variety of fields, including politics, business, the arts, and academics. Marquardt has been involved with the recording, editing, duplicating and distribution of these speeches to over 100 radio stations. (Affinity Ex. 2, p. 4)

57. At Hi-Speed, Marquardt was responsible for soliciting new business, inventory control and invoicing and collection of receivables. He accepted a new position in Franklin Mieuli and Associates' production company as a radio remote engineer. He was responsible for producing and engineering radio broadcasts for the local professional sports franchises. These included the San Francisco 49ers, the San Francisco Giants and the San Francisco Warriors. (Affinity Ex. 2, p. 4)

58. Marquardt also assisted in the production of a weekly televised sports program entitled Forty-Niner Highlights, which was produced by Franklin Mieuli and Associates from 1962 to 1964.

Marquardt assisted in the editing and the cutting of soundtracks and worked under a 48-hour deadline for a live telecast. (Affinity Ex. 2, pp. 4-5)

59. As a local extension of providing production and engineering for local sports franchises, Franklin Mieuli and Associates also provided a similar service for a number of other teams. Marquardt was responsible for engineering and producing radio broadcasts for other professional sports franchises. This included working for such radio stations as WGN/Chicago, KDKA/Pittsburgh and WCAU/Philadelphia. (Affinity Ex. 2, p. 5)

60. In the summer of 1964, the Republican National Convention was held in San Francisco. Marquardt was contracted by WGN/Chicago to work as the audio engineer for their news crew, recording news stories for both radio and TV. (Affinity Ex. 2, p. 5)

61. In 1965, Marquardt became an equal partner in Franklin Mieuli and Associates. One year later, his partner, Franklin Mieuli, gained controlling interest in the San Francisco Warriors and, in October of 1966, made Marquardt responsible for producing and engineering Warrior radio broadcasts, and and producing and directing televised games. In 1968, Marquardt was officially named Director of Broadcasting for the Warriors. (Affinity Ex. 2, p. 5)

62. In 1969, Marquardt designed and built a television remote truck, complete with two tape machines and three cameras. With these facilities, he produced and directed over 60 telecasts for the Women's Professional Basketball League. This was in addition to his duties with the Warriors. (Affinity Ex. 2, pp. 5-6)

63. From 1966 to approximately 1976, Marquardt was responsible for the management and operation of Mieuli and Associates and Hi-Speed. During these years, he continued to engineer and produce the Warrior broadcasts, in addition to other engineering duties for the other broadcast clients of Mieuli and Associates. Marquardt initiated a number of programs, which Mieuli and Associates produced including in 1973 the U.S. Open in Pebble Beach for the Robert Wold Company, the British Open in Edinburgh, Scotland and the PGA Tournament in Detroit, Michigan. These broadcasts were aired over the Mutual Network and American Forces Radio. Marquardt was also awarded the contract to produce and direct the radio broadcasts for the Oakland A's radio network in the 1973, 1974 and 1975 seasons. He produced and directed all home and away games during these seasons and in 1975, in conjunction with the A's broadcasts, he produced a weekly sports program from a restaurant in Oakland that aired on the A's flagship station, radio Station KEEN. (Affinity Ex. 2, p. 6)

64. In 1976, Peter Mieuli became involved in Franklin Mieuli and Associates as an equal partner, assuming his father's interest, and the company changed names to Mieuli and Associates. When Peter Mieuli came into the company, Mieuli and Associates was

restructured as an independent company and was no longer an in-house facility. Since 1976, under the management of Michael Marquardt and Peter Mieuli, the company has grown and expanded its radio and television operations. Mieuli and Associates has engaged over 100 radio engineers on a contractual basis who engineer in excess of 700 sports broadcasts annually. Mieuli and Associates produce annually an average of 45 live telecasts, in addition to syndicated radio programs, including the Commonwealth Club of California, University Explorer and California Times. (Affinity Ex. 2, pp. 6-7)

65. From 1976 to 1982, in order to perform his duties as Director of Broadcasting for the Golden State Warriors, Marquardt joined the engineering staff of radio Station KNBR, San Francisco, California, owned and operated by NBC, and was employed for the course of the September-May NBA season, at which time he still maintained his position with Mieuli and Associates and continued to perform his duties in that capacity. He worked with the chief engineer of Station KNBR on arranging transmission facilities and equipment. He assisted the Station KNBR sales department and produced the Warrior basketball games.[15] Marquardt has resigned from his position at Station KNBR and, commencing with the 1983-84 NBA season, will act only as a consultant to the Warriors in their relationship with radio Station KNBR. (Affinity Ex. 2, p. 7; Affinity Ex. 6, p. 2)

66. Marquardt will have limited continuing responsibilities with Mieuli and Associates and Hi-Speed as a consultant. He anticipates that no more than two hours per week will be required for consulting. (Affinity Ex. 7, p. 2)

67. Marquardt has been involved in his residential community of Newark in AAU Swimming, Little League baseball, and in soccer, football, and bowling leagues for youth. Such activities have involved participation in the local public schools, which the Marquardts' three children have attended. (Affinity Ex. 2, pp. 8-9)

68. Should the Affinity application be granted, Peter Mieuli (Mieuli) President, Director and 50% shareholder of Affinity, will perform duties for the proposed FM station on a part-time basis in the areas of sales, promotion, and community relations. He will oversee the effectuation of the policies set for the station by its Board of Directors. He plans to be in Colusa four days per month during the first year or so of the station's operation. In addition, he will make sales calls in San Francisco on various advertising agencies and station sales representatives to enhance the national sales for the FM station. He will be involved in developing sales and listener promotions, and plans to become involved in community relations

---

[15] His duties at Station KNBR did not include managerial responsibilities. (TR 9)

during trips to Colusa. He will be involved in the production of public affairs programs syndicated through Hi-Speed. (Affinity Ex. 8, p. 1)

69. Mieuli is 31 years of age and is married with three children. His residence is San Jose, California. (Affinity Ex. 4, p. 1)

(2) *Diversification*

70. Peter Mieuli is the Secretary, and a Director, of San Francisco Kinescope, Inc., applicant for a construction permit for a low power television station on Channel 12 in San Francisco, California. He has no ownership interest in the applicant. San Francisco is located over 120 miles from Colusa. There are eleven television stations licensed to San Francisco/Oakland, and five additional television stations licensed to San Jose and San Mateo. There are AM and FM stations licensed to San Francisco and its environs, and numerous daily and weekly newspapers. CATV systems import the signals of television stations in Atlanta, Chicago, Sacramento/Stockton, and other areas into San Francisco. (Affinity Ex. 9, pp. 1-2)

71. Mieuli is the President, a Director, and 50% Shareholder of Marigold Broadcasting, Inc. (Marigold), applicant for an FM station on Channel 246B in Visalia, California. Susan Mieuli is the Secretary/Treasurer, a Director, and 50% Shareholder of Marigold. Visalia is located approximately 270 miles from Colusa. There are two radio stations (AM and FM) licensed to Visalia, as well as one television station. Daily and weekly newspapers and a CATV system have readership and viewership in Visalia. (Affinity Ex. 9, p. 2)

72. Mieuli is the Secretary, and a Director, of Bay Area Microwave, Inc., permittee of a point-to-point microwave system to be located at Oakland, Vollmer Peak, San Ramon, Monument Park and Loma Prieta to serve CATV systems in the San Francisco area. Mieuli has no ownership interest in Bay Area Microwave, Inc. (Affinity Ex. 9, p. 2)

(3) *Auxiliary Power*

73. Affinity proposes to equip its station with a stand-by auxiliary power supply through the purchase of a generator for the transmitter, and an auxiliary power supply for its studio equipment (Affinity Ex. 10)

(b) *Sacramento Valley Radio, Inc.*

(1) *Integration*

74. Sacramento Valley Radio, Inc. (Sacramento) is a California corporation engaged exclusively in applying for a construction permit for new FM broadcast station at Williams, California. The transmitter and antenna will be located on Sites Peak, 2.0 miles

south of Sites, California, and the studios will be located at a site to be determined in Williams. (Sacramento Ex. 1, p. 1)

75. Sacramento is authorized to issue 10,000 shares of common voting stock, of which two (2) shares have been issued to California Oregon Broadcasting, Inc. (COBI)[16]

76. The officers and directors of Sacramento are (Sacramento Ex. 1, pp. 1–2):

| | |
|---|---|
| Patricia C. Smullin<br>Medford, Oregon | President & Director |
| Richard W. Green<br>Reeding, California | Vice President & Director |
| Carl M. Brophy, Esq.<br>Medford, Oregon | Assistant Secretary |
| William B. Smullin<br>Medford, Oregon | Chairman of the Board, Secretary & Director |
| Patricia D. Smullin<br>Medford, Oregon | Treasurer & Director |

77. COBI is an Oregon corporation, all of whose stock is owned by the William B. Smullin family. It is authorized to issue 60,000 shares of common voting stock of which 23,799.57 shares are issued and outstanding, and, additionally, there are 2,567.18 shares held as Treasury stock. COBI also has 400 shares of non-voting preferred stock, authorized; none of which has been issued. The officers, directors and stockholders of COBI are:

| | *Office-Director* | *Shares* | *%* |
|---|---|---|---|
| William B. Smullin<br>Medford, Oregon | President | 15,986.50 | 67.17 |
| Patricia C. Smullin<br>Medford, Oregon | Vice President & Assistant Treasurer | 2,779.40 | 11.68 |
| Carol Anne Brown<br>Longview, Washington | Vice President & Assistant Secretary | 2,710.17 | 11.39 |
| Patricia D. Smullin<br>Medford, Oregon | Tresurer-Assistant Secretary | 637.00 | 2.68 |

---

[16] COBI has since applied for Commission consent to the *pro forma* assignment of assets to California Oregon Broadcasting Investments, a partnership, and consent was granted on December 15, 1982.

| | *Office-Director* | *Shares* | *%* |
|---|---|---|---|
| Shirley Lou Smullin<br>North Hollywood, Cal. | | 1,686.50[17] | 7.08 |
| Richard W. Green<br>Redding, California | Vice President | None[17] | |
| Edward A. Malone[18]<br>Grants Pass, Oregon | Vice President<br>(Engineering) | None | |
| Delbert G. Cantrall<br>Medford, Oregon | Vice President<br>(Engineering) | None | |
| Carl M. Brophy<br>Medford, Oregon | Secretary | None | |
| James P. Rowan<br>Medford, Oregon | Director | None | |
| James S. Ingram<br>Medford, Oregon | Director | None | |

Carol Anne Brown, Pactricia C. Smullin and Shirley Lou Smullin are sisters, and are daughters of William B. and Patricia D. Smullin. (Sacramento Ex. 1, pp. 2–3)

78. None of the officers, directors or shareholders of Sacramento or COBI are proposed to be integrated into the operations of the proposed FM station.

(2) *Diversification*

79. COBI owns 100% of Sacramento Valley Television, Inc. (Sacramento Valley), licensee of Station KRCT-TV, Channel 7, Redding, California. (Sacramento Ex. 1, p. 3) Redding, California is approximately 100 air and road miles from Williams, California. (TR 115) The signal of Station KRCT-TV is carried on the CATV system in the city of Williams, California. (TR 127)[19]

80. Sacramento Valley owns 100% of Redwood Broadcasting Co. (Redwood), licensee of Standard Broadcast Station KEKA, 790 kHz, 5 kw-D, Eureka, California. Redwood's application for a construction permit for a new FM broadcast station in Eureka was granted by

---

[17] Shirley Lou Smullin is neither an officer or director of COBI. She has sold her stock interest to COBI. In accepting the amendment which reported this transaction, the Presiding Judge ruled that no comparative advantage was to accrue. *Order* (FCC 82M-3918), released December 9, 1982. By *Order* (FCC 82M-4051), released December 21, 1982, the Presiding Judge accepted an amendment reporting the transfer of .98 shares of stock of COBI.

[18] Edward A. Malone is not a director of COBI.

[19] Station KRCR-TV is a primary ABC affiliation, and it carries some NBC programs. (TR 128)

Judge Stirmer by *Order* released April 1, 1983. (Sacramento Ex. 1, p. 3; TR 127)[20] Eureka, California is approximately 150 air miles from Williams, California. (TR 127)

81. COBI owns 100% of Oregon Broadcasting Company (OBC), licensee of television Station KOBI-TV, Channel 5, Medford, Oregon. (Sacramento Ex. 1, p. 3) Station KOBI-TV is primarily affiliated with the ABC network. It also carries programs of the CBS network. (TR 128) Medford, Oregon is approximately 225 air miles from Williams, California. (TR 128)

82. OBC also is the licensee of Station KOTI-TV, Channel 2, Klamath Falls, Oregon. (Sacramento Ex. 1, p. 3) Station KOTI-TV is a satellite of Station KOBI-TV and carries the same network programming as Station KOBI-TV. (TR 129) Klamath Falls is approximately 220–225 air miles from Williams, California. (TR 128)

83. OBC owns 95% of KAGI, Inc. the licensee of Standard Broadcast Station KAGI, 930 kHz, 5 kw-D, 1 kw-N, DAN, Grants Pass, Oregon. (Sacramento Ex. 1, p. 3) Grants Pass, Oregon, is approximately 250 air miles from Williams, California. (TR 131)

84. OBC owns 50% of Southwest Oregon Television Broadcasting Corporation, licensee of television Station KPIC-TV, Channel 4, Roseburg, Oregon. (Sacramento Ex. 1, p. 3) Roseburg, Oregon is approximately 300 air miles from Williams, California. (TR 132)

85. COBI owns 100% of California Oregon Television, Inc., operator of Oregon CATV systems in Prineville and adjacent areas in Crook County; Madras, Culver, Metolius and adjacent areas in Jefferson County; Enterprise, Lostine, Joseph and adjacent areas in Wallowa County and La Pine-Wickiup-Deschutes County areas. (Sacramento Ex. 1, p. 4) The CATV systems of California Oregon Television, Inc., are located approximately 375–400 air miles from the nearest boundary line of Colusa County. (TR 133)

86. COBI owns 100% of Washington Oregon Broadcasting, Inc., an applicant for a construction permit for a new FM station in Olympia, Washington. (Sacramento Ex. 1, p. 4)

87. Stockholders, officers and directors of Sacramento are also officers and/or directors of other COBI related entities as follows (Sacramento Ex. 1, pp. 4–5):

> *Patricia C. Smullin* - Assistant Secretary and Treasurer of KAGI, Inc.; President, Treasurer and Director of Redwood Broadcasting Company; Treasurer of Oregon Broadcasting Company; President and Director of California Oregon Television, Inc.; and Assistant Secretary and Director of Washington Oregon Broadcasting, Inc.

---

[20] The Presiding Judge, by *Order* (FCC 83M-1877), released June 8, 1983, granted a "Petition For Leave To Amend," filed April 18, 1983 by Sacramento reporting that on March 15, 1983, the Commission granted consent to the *pro forma* transfer of control of Redwood from COBI to Sacramento Valley, and, further, that on April 1, 1983, Judge Stirmer released an *Order* granting Redwood's application for a new FM station at Eureka, California.

*Richard W. Green* - President and Director of Sacramento Valley Television, Inc.; and Director of Oregon Broadcasting Company.

*Carl M. Brophy, Esq.* - Secretary of Oregon Broadcasting Company, Sacramento Valley Television, Inc., KAGI, Inc., and Washington Oregon Broadcasting, Inc.; Assistant Secretary of Redwood Broadcasting Company; and Secretary and Director of California Oregon Television, Inc.

*William B. Smullin* - Chairman of the Board, Assistant Secretary and Director of Oregon Broadcasting Company; Vice President and Director of Sacramento Valley Television, Inc.; Director of Southwest Oregon Television Broadcasting Corporation; Secretary, Treasurer, Vice President and Director of Eel River Publishing Company (an inactive company); Chairman of the Board of KAGI, Inc.; Chairman of the Board and Director of Redwood Broadcasting Company; Vice President, Treasurer, Assistant Secretary and Director of California Oregon Television, Inc.; and Chariman of the Board and Director of Washington Oregon Broadcasting, Inc.

*Patricia D. Smullin* - Vice Presiding and Director of Oregon Broadcasting Company; Assistant Secretary of Sacramento Valley Television, Inc.; Treasurer of Washington Oregon Broadcasting, Inc.; and Director of California Oregon Television, Inc.

(3) *Auxiliary Power*

88. Sacramento has made provision for a stand-by electrical generator to supply electric power to the proposed station. (Sacramento Ex. 2)

(C) *Issue re Waiver of 47 CFR 73.1125 and 73.1130*

89. The studios of Sacramento's proposed FM station will be located at a site to be determined in Williams, California. (Sacramento Ex. 1, p. 1)

90. The record in this case is silent as to the distance between Colusa and Williams, California and as to the availability of public transportation between these communities. As a result, the record does not disclose whether the studios of Sacramento's proposed FM station in Williams would be easily accessible to residents of Colusa, California.

91. There is no evidence in the record of any proposal of Sacramento to originate programming from Colusa, nor is there evidence of any proposed program to serve the needs of Colusa.

### *Ultimate Findings and Conclusions*

1. This proceeding involves the applications of Affinity Communications, Inc. (Affinity) and Sacramento Valley Radio, Inc. (Sacramento) for authority to construct and operate a new FM broadcast station in Colusa and Williams, California, respectively. These proposals are mutually exclusive. Since the applicants propose to operate their proposed facilities in different communities, it must be determined, in light of Section 307(b) of the Communications Act of 1934, as amended, which of these proposals would better provide a fair, efficient and equitable distribution of radio service. In the event

it is concluded that Section 307(b) is determinative and that the community of Colusa has a greater need for a first local broadcast outlet, then a determination must be made as to whether a waiver is warranted of Sections 73.1125 and 73.1130 of the Commission's Rules, 47 CFR 73.1125 and 73.1130, with respect to the Sacramento proposal. Lastly, should it be ruled that Section 307(b) is not determinative or that, although Colusa is the 307(b) choice, a waiver of 47 CFR 73.1125 and 73.1130 of the Rules is warranted relative to Sacramento's proposal, then a full comparative evaluation and choice would have to be made.

2. In making the Section 307(b) evaluation, it is important to note that both applicants propose the same antenna site and that there is no significant difference in their proposed coverage. The applicants have agreed that the areas and populations that would receive primary aural service (1 mV/m or greater) and the availability of other primary service to those areas and populations are virtually the same for the two proposals. Therefore, it is concluded that the need for reception service is not a factor in the Section 307(b) choice to be made.

3. Colusa and Williams, located in Colusa County, California, have populations of 4,075 and 1,655, respectively. There is no FM or AM station presently assigned to either community and no AM or FM stations are located in Colusa County. Both applicants would provide a city grade (3.16 mV/m) signal to Colusa and Williams. A number of county governmental offices are situated in Colusa, the County seat. As acknowledged by Sacramento, the governmental importance of Colusa surpasses that of Williams.

4. Sacramento's contention that an analysis of commercial activity requires the conclusion that Williams is of greater significance and, therefore, has a greater need for a local transmission outlet than Colusa is rejected as contrary to the record evidence. As detailed in the findings, Colusa is superior to Williams in taxable sales, wholesale trade establishments, retail establishments, retail sales, retail trade employment, service industries and employment and receipts from service industries. The totality of the evidence supports the conclusion that Colusa has a greater need for a local broadcast outlet than does Williams. It is ruled that Section 307(b) is determinative in this proceeding.

5. Sacramento failed to offer any evidence which would warrant waiver of 47 CFR 73.1125, which deals with main studio location, and 73.1130, the program origination requirement. As a result, Sacramento is not entitled to "reciprocal service" consideration. The studios of Sacramento are proposed to be located in Williams. The record in this case is silent as to the distance between Williams and Colusa and, more importantly, as to the availability of public transportation between the communities. The record is devoid of evidence as to whether Sacramento's studio would be easily accessi-

ble to the residents of Colusa, the extent to which sacramento proposes to originate programming from Colusa or of any programs proposed to serve the needs of Colusa.

6. It has been ruled that Section 307(b) is dispositive; and that the need for a local broadcast outlet in Colusa is greater than for Williams, and that Sacramento's proposal is not entitled to comparative consideration with the Affinity proposal for Colusa. However, in order that reviewing authority may have the benefit of the Presiding Judge's evaluation, the comparative aspects of the proposal will be addressed. The Commission has emphasized on numerous occasions that the two primary objectives to be accomplished in making the comparative choice are to obtain the best practicable service to the public and to achieve maximum diffusion of control over the media of mass communications.[21]

7. None of the principals of Affinity have any ownership interests or management positions in any standard, FM or television broadcast facilities or other media of mass communications. The principals of Sacramento, on the other hand, have extensive radio, television and CATV ownership interests in Northern California and Oregon, the closest being about 100 air miles from Williams.[22] This fact warrants accessing a preference in favor of Affinity relative to the factor of mass media diversification.

8. With respect to the aspect of integration of ownership and management, it is important to note that Sacramento proposes no integration whereas Michael Marquardt, a 50% stockholder of Affinity will be integrated on a full time basis as general manager of the proposed station. Peter Mieuli, the other 50% stockholder, will perform duties for the proposed FM station on a part-time basis. However, this part time participation does not represent a commitment to devote a minimum of 20 hours a week to the operation of the station, and falls below the 20 hours minimum for an award of partial integration *WIOO, Inc.*, 95 FCC 2d 974; (FCC 83–367), released September 16, 1983.[23] On the basis of these facts it is ruled that Affinity is entitled to a preference with respect to integration of ownership and management and a "very slight" preference for its auxiliary power proposal. It is apparent that Affinity is comparatively superior to Sacramento.

Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision is taken by a party or the Commission reviews this decision on its own motion, in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 CFR 1.276[24], the application of Affinity Communications, Inc. for a new FM broadcast station at Colusa, California IS GRANTED and the application of Sacramento Valley Radio, Inc. IS DENIED.

---

[21] *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, (Commission 1965).

[22] Paragraphs 79 - 87 of the findings, *supra*.

[23] A "relatively slight part-time credit" is accorded for Mieuli's participation. *Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046 (Rev. Bd. 1982).

[24] In the event exceptions are not filed within 30 days after the release of this Initial

FEDERAL COMMUNICATIONS COMMISSION
THOMAS B. FITZPATRICK,
*Assistant Chief Administrative Law Judge*

---

Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release, pursuant to 47 CFR 1.276(d).

Severance
Site Availability

**Review Board denied petition to enlarge seeking transmitter site availability and related issues because request based on hearsay. Board noted that applicant had in fact lost its site but declined to add an issue because the applicant was actively seeking to secure a new site.**
*–Alan K. Levin*
BC Docket No. 80–712

FCC 84R–10

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| ALAN K. LEVIN<br>Dillon, Colorado | BC Docket No. 80–712<br>File No. BP-20,581 |
| SUMMIT RADIO, INC.<br>Dillon-Frisco-Silverthorne, Colorado | BC Docket No. 80–713<br>File No. BP-780728AN |
| DILLON BROADCASTING COMPANY<br>Dillon, Colorado | BC Docket No. 80–714<br>File No. BP-780728AO |
| GRAND RADIO, INC.<br>Fraser, Colorado | BC Docket No. 80–717<br>File No. BP-21,129 |
| JEFFERSON WIRELESS COMPANY<br>Golden, Colorado | BC Docket No. 80–718<br>File No. BP-781205AH |
| For Construction Permit | |

## MEMORANDUM OPINION AND ORDER

(Adopted: February 10, 1984; Released: February 16, 1984)

BY THE REVIEW BOARD: Board Member Blumenthal absent.

1. This consolidated proceeding involves two sets of mutually exclusive applications for authority to construct new AM broadcast stations in various communities: (a) Alan K. Levin, Summit Radio, Inc., and Dillon Broadcasting Company for Dillon, Dillon-Frisco-Silverthorne, and Dillon, Colorado, respectively; and (b) Grand Radio, Inc. (Grand) and Jefferson Wireless Company (Jefferson) for Fraser and Golden, Colorado, respectively. A hearing was held before Administrative Law Judge (ALJ) Joseph Chachkin, who, on July 18, 1983, released an Initial Decision (FCC 83D-39) granting the applications of Dillon Broadcasting and Jefferson. Exceptions were filed by the losing applicants and oral argument was held. While the exceptions were pending, Grand filed a petition to enlarge issues on October 5, 1983, seeking the addition of transmitter site availability and related issues against Jefferson, severance of the Grand and Jefferson applications from this proceeding, and remand of the case for further consideration of the specified issues. Jefferson opposed the petition; and on January 10, 1984, filed a petition for leave to amend its application to show that it was seeking a new transmitter site. For the reasons set forth below, we will deny Grand's petition to enlarge the issues; however, we will sever the applications of Grand and Jefferson from this proceeding and direct that Jefferson file status reports with the Board concerning its efforts to obtain a new transmitter site.

2. Grand's request for transmitter site availability and related issues, *i.e.*, lack of candor, misrepresentation, reporting, financial, and equipment and engineering accuracy, is predicated on the affidavit of Dwight H. Gayer, President of Grand, who avers that he was informed by various individuals that the land proposed for Jefferson's transmitter site (Jefferson has a lease on the land) is no longer available, and has not been available since mid-1982, because the land was sold at that time and is currently being developed by the new owner for condominiums, townhouses, and commercial buildings. Gayer avers further that he was told that Mrs. E. Broughall, a partner in Jefferson, has been aware of these facts since mid-1982. Gayer's affidavit lists Duane Tinsley, director of Community Development for the city of Golden, as one of the individuals who told Gayer that Jefferson's use of the site "had been dropped in 1982" because of the sale and plans for development, and that Mrs. Broughall knew of these circumstances. The affidavit adds that Tinsley informed Gayer of his belief that there were no suitable or available sites for use as a radio station in the city of Golden. Grand argues that the related issues are necessary because Jefferson never informed the Commission of the loss of the site, and because the loss of the site calls into question Jefferson's financial and engineering proposals.

3. In opposition, Jefferson does not dispute that the land for its proposed transmitter site has been sold and that the new owner

intends to use the land for development rather than let Jefferson use it for its radio station. Rather, Jefferson claims that it has a binding legal agreement (the business lease) for the site. In support, Jefferson submits the affidavit of Broughall's local counsel concerning the lease who asserts that it is his legal opinion that the lessor or its successors in interest are obligated to provide Jefferson the land for the site or to provide a substitute therefor. He asserts that Jefferson was never given notice of the sale or a first right of refusal as provided for by the terms of the lease. Jefferson also submits the affidavit of Broughall in which she denies that she knew in mid-1982 that the site was not available. She states that the sale of the land was in violation of the terms of the lease and that neither she nor Jefferson received notice of the sale and subsequent conversion of the property. Finally, Jefferson furnishes the affidavit of Tinsley who denies having direct knowledge of an affirmative action by Jefferson to "drop" the use of the site or of making a statement that there are no suitable or available sites for a radio station in Golden. He also implicitly denies that Broughall knew in mid-1982 of the sale stating instead that he spoke to her in the "early summer of 1983" and that it "appeared through the conversation that Mrs. Broughall had just recently become aware of the rezoning and the loss of 'leasehold.'" On January 10, 1984, Jefferson submitted an amendment acknowledging that a lawsuit was necessary in order to secure its original leased site. It states that it is pursuing such a course against the former land owner. Additionally, it indicates that when the "snow in the Rockies has cleared" it will acquire a new transmitter site, and immediately file an appropriate engineering amendment.

4. The Board will not add the requested issues. Section 1.229(d) of the Commission's Rules provides that allegations of fact to support the action requested shall be supported by affidavits of a person or persons having personal knowledge thereof. Here, the allegations contained in Gayer's affidavit, the sole support for Grand's requested issues, are hearsay, and insufficient to support enlargement of the issues under Section 1.229. *See Jimmie H. Howell*, 46 FCC 2d 50, 57–58, 29 RR 2d 1317, 1326–27 (Rev. Bd. 1974). Moreover, it is apparent from Tinsley's affidavit that Gayer's allegations are overstated. And, we are not persuaded that a reporting issue should lie on the basis of Tinsley's remark that Broughall appeared to learn about the lease problem in "early Summer" of 1983 (Grand's petition to enlarge was filed at the beginning of October). There is no indication that Tinsley was speaking in anything other than figurative terms, and the language on its face is ambiguous as to the precise time Broughall learned of the potential site loss.

5. Although we deny Grand's petition, it is clear from the tenor of the parties' pleadings that the new owner of Jefferson's proposed site is unwilling currently to give his consent to the use of the land

and that the current zoning restrictions do not contemplate the installation of radio towers. We have recently had occasion to examine a similar factual situation in *Kaldor Communications, Inc.*, FCC 84R-7, February 3, 1984. There, we held that a site availability issue would be specified, in the absence of a proffered alternative site, where the owner of the site and the lessee were clearly at odds over its use, notwithstanding the possibility that the lessee might prevail in court and secure specific performance of the lease arrangement. Here, Jefferson has indicated both that it is taking some action in attempting to obtain its presently proposed site and that it is seeking to acquire a new site as soon as possible. Based on this representation, we believe that it would serve no purpose to specify an issue at this time; however, to ensure the prompt and orderly disposition of the Commission's business, we will sever the applications of Grand and Jefferson from this proceeding.[1] We shall also direct Jefferson to file a report by February 29, 1984, informing us as to the specific actions it has taken and proposes to take to secure a new site. Thereafter we shall expect progress reports every thirty days, and if it appears that Jefferson lacks diligence in its efforts to obtain a transmitter site, we will specify an appropriate issue and remand this case for further hearing.

6. ACCORDINGLY, IT IS ORDERED, That the petition to enlarge issues filed on October 5, 1983, by Grand Radio Inc. IS DENIED; and that the petition for leave to amend filed January 10, 1984, IS GRANTED, and the amendment IS ACCEPTED; and

7. IT IS FURTHER ORDERED, That the applications of Grand Radio, Inc. (File No. BP-21, 129) and Jefferson Wireless Company (File No. BP-781205 AH) ARE SEVERED from this proceeding; and that Jefferson Wireless Company IS DIRECTED to file progress reports with the Review Board in accordance with paragraph 5 of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

---

[1] The inquiry necessitating consolidation of the proceeding (*i.e.*, members of the Gayer family are principals in more than one application, Grand and Summit, and questions were raised regarding whether grant of both would violate the multiple ownership rules) has been held, and no exceptions have been raised to the ALJ's resolution of this question favorably to the applicants. Thus, consolidation, with attendant delays associated with Jefferson's application, no longer appears warranted. *See* also Oral Argument Tr. 4181.

FCC 83D-39

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| ALAN K. LEVIN<br>Dillon, Colorado | BC Docket No. 80-712<br>File No. BP-20,581 |
| SUMMIT RADIO, INC.<br>Dillon-Frisco-Silverthorne, Colorado | BC Docket No. 80-713<br>File No. BP-780728AN |
| DILLON BROADCASTING COMPANY<br>Dillon, Colorado | BC Docket No. 80-714<br>File No. BP-780728AO |
| GRAND RADIO, INC.<br>Fraser, Colorado | BC Docket No. 80-717<br>File No. BP-21,129 |
| JEFFERSON WIRELESS COMPANY<br>Golden, Colorado | BC Docket No. 80-718<br>File No. BP-781205AH |
| For Construction Permit | |

### *Appearances*

*Michael Finkelstein*, *Nancy L. Gruenberg* and *William S. Andrews*, on behalf of Alan K. Levin; *Michael L. Glaser*, *Francis E. Fletcher, Jr.*, *Kathy J. Bible* and *Paul Korman*, on behalf of Summit Radio, Inc., Eagle Radio, Inc., and Grand Radio, Inc.; *Richard A. Helmick*, on behalf of Dillon Broadcasting Company and Mountain Wireless Limited; *T. Eugene Smith* and *Richard F. Kennedy*, on behalf of Jefferson Wireless Company; *William H. Crispin* and *Henry Goldberg*, on behalf of Western Slope Communications, Ltd.; *Elizabeth R. Costle*, on behalf of Omaha TV 15, Inc.; and *William D. Silva*, on behalf of the Mass Media Bureau, Federal Communications Commission.

# INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

(Issued: July 7, 1983 Released: July 18, 1983)

## *Preliminary Statement*

1. By *Memorandum Opinion and Order*, 45 Fed. Reg. 85512, December 29, 1980, the Commission designated three sets of mutually exclusive applications for a consolidated hearing, *i.e.*: (1) Alan K. Levin (Levin) for Dillon Colorado, Summit Radio, Inc. (Summit) for Dillon-Frisco-Silverthorne, Colorado, and Dillon Broadcasting Company (Dillon) for Dillon; (2) Eagle Radio, Inc. (Eagle) and Mountain Wireless Limited (Mountain) for Vail, Colorado; and (3) Grand Radio Inc. (Grand) for Fraser, Colorado, and Jefferson Wireless Company (Jefferson) for Golden, Colorado. The three sets of AM applications were consolidated because members of the Gayer family were principals in one application of each set (Summit, Eagle and Grand) and questions were raised regarding whether a grant of these three applications or a combination thereof would violate the Commission's multiple ownership rules. The following issues were specified in the designation order:

> (1) To determine whether grant of the application of Summit Radio, Inc., Eagle Radio, Inc., or Grand Radio, Inc., or any combination thereof, would violate Section 73.35(a) of the Commission's Rules with respect to multiple ownership or control of broadcast stations or Section 73.35(b) of the Commission's Rules with respect to regional concentration of control.[1]
>
> (2) To determine with respect to Alan K. Levin:[2]
>
> a. The source and availability of sufficient funds to meet anticipated costs; and
>
> b. Whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.
>
> (3) To determine with respect to the efforts of Alan K. Levin to ascertain the needs of his proposed service area:[2]
>
> a. Whether the applicant adequately determined the racial, ethnic, or minority

---

[1] This issue was modified by *Order*, FCC 81M-1801, released June 11, 1981 and further modified by *Order*, FCC 82M-3331, released October 26, 1982. The issues, as modified by the latter *Order* reads as follows:

> (1) To determine whether grant of the application of Summit Radio, Inc., Grand Radio, Inc., Fruita Broadcasting Company, or Dwight H. Gayer d/b/a Grand Communications Company, or any combination thereof, would violate Section 73.35(a) of the Commission's Rules, with respect to multiple ownership or control of broadcast stations or Section 73.35(b) of the Commission's Rules.

The burdens of proceeding and proof on modified Issue 1 were placed on Summit and Grand.

[2] Issues 2 and 3 were resolved in the applicant's favor by summary decision. FCC 81M-525, released February 23, 1981.

[2] Issues 2 and 3 were resolved in the applicant's favor by summary decision. FCC 81M-525, released February 23, 1981.

composition; governmental activities; and public service organizations of Dillon;

b. Whether the applicant interviewed leaders of charities, elderly, minorities, professions, women, and youth in Dillon;

c. Whether the applicant interviewed a sufficient number of members of the Dillon general public to assure a generally random sample; and

d. Whether the applicant's programming proposal reflects an evaluation of his ascertained problems and needs.

(4) To determine with respect to Summit Radio, Inc.:[3]

a. The source and availability of sufficient funds to meet anticipated costs; and

b. Whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

(5) To determine with respect to the efforts of Summit Radio, Inc. to ascertain the needs of its proposed service area:[3]

a. Whether the applicant adequately determined the composition of Dillon, Frisco, and Silverthorne; and

b. Whether the applicant interviewed leaders of business, charities, consumers, elderly, minorities, professions, and women in the communities it proposes to serve.

(6) To determine whether the proposal of Summit Radio, Inc. to serve three communities is in compliance with Section 73.1120 of the Commission's Rules, and if not whether circumstances exist which warrant a waiver of that Section.

(7) To determine with respect to the efforts of Dillon Broadcasting Company to ascertain the needs of its proposed service area:[3]

a. Whether the applicant adequately determined the racial, ethnic, or minority composition, and the economic activities of Dillon;

b. Whether the applicant interviewed leaders of business, consumers, culture, and minorities in Dillon;

c. Whether the applicant's interviews with members of the Dillon general public assured a generally random sample; and

d. Whether the programming the applicant proposes in response to its ascertained problems and needs is scheduled at times when it could reasonably be expected to be effective.

(8) To determine the areas and populations which would receive primary aural service from the proposals of Alan K. Levin, Summit Radio, Inc., and Dillon Broadcast Company, and the availability of other primary service to such areas and populations.

(9) To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, whether the Dillon-Frisco-Silverthorne proposal or one of the

---

[3] Issues 4, 5 and 7 were resolved in the applicants' favor by summary decision. FCC 81M-525, released February 23, 1981.

[3] Issues 4, 5 and 7 were resolved in the applicants' favor by summary decision. FCC 81M-525, released February 23, 1981.

Dillon proposals would better provide a fair, efficient, and equitable distribution of radio service.

(10) To determine, in the event it be concluded that a choice among the Dillon and Dillon-Frisco-Silverthorne applications should not be based solely on considerations relating to Section 307(b), which of the proposals would on a comparative basis best serve the public interest.

(11) To determine with respect to Eagle Radio, Inc.:[4]

a. Whether the amount it proposes for its antenna tower is sufficient to meet that purpose;

b. The source and availability of sufficient funds to meet anticipated costs; and

c. Whether, in light of the evidence adduced pursuant to (a) and (b) above, the applicant is financially qualified.

(12) To determine with respect to the effors of Eagle Radio, Inc. to ascertain the needs of its proposed service area:[5]

a. Whether the applicant adequately determined the population characteristics, governmental activities, and public service organizations of Vail;

b. Whether the applicant interviewed leaders of charities, Hispanics, labor, professions, and women in Vail; and

c. Whether the applicant's interviews with members of the Vail general public assured a generally random sample.

(13) To determine with respect to the efforts of Mountain Wireless Limited to ascertain the needs of its proposed service area:[5]

a. Whether the applicant adequately determined the population characteristics, governmental activities, and public service organizations of Vail;

b. Whether the applicant interviewed leaders of charities, civic groups, elderly, Hispanics, labor, professions, and women in Vail; and

c. Whether the programming the applicant proposes in response to its ascertained problems and needs is scheduled at times when it could reasonably be expected to be effective.

(14) To determined which of the Vail proposals would, on a comparative basis, better serve the public interest.

(15) To determine with respect to Grand Radio, Inc.:[6]

a. The source and availability of sufficient funds to meet anticipated costs; and

b. Whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

(16) To determine with respect to the efforts of Grand Radio, Inc. to ascertain the needs of its proposed service area;

---

[4] Issue 11 was resolved in the applicant's favor by summary decision. FCC 81M-525, released February 23, 1981. In any event, Eagle's application was dismissed pursuant to a settlement agreement. See FCC 82M-2499, released August 19, 1982.

[5] Issues 12 and 13 were resolved in the applicants' favor by summary decision. FCC 81M-525, released February 23, 1981.

[6] Issue 15 was resolved in the applicant's favor by summary decision. FCC 81M-1141, released April 16, 1981.

**a. Whether the applicant adequately determined the composition of Fraser; and**

**b. Whether the applicant interviewed minority leaders in Fraser.[7]**

**(17) To determine with respect to Jefferson Wireless Limited:[8]**

**a. The source and availability of sufficient funds to meet anticipated costs; and**

**b. Whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.**

**(18) To determine with respect to the effors of Jefferson Wireless Limited to ascertain the needs of its proposed service area:[9]**

**a. Whether the applicant adequately determined the racial, ethnic, or minority composition, and the economic activities of Golden;**

**b. Whether the applicant interviewed minority leaders in Golden;**

**c. Whether the applicant adequately ascertained community problems outside of Golden;**

**d. Whether the applicant listed all ascertained community problems; and**

**e. Whether the applicant's programming proposal reflects an evaluation of its ascertained problems and needs.**

**(19) To determine the areas and populations which would receive primary aural service from the proposals of Grand Radio, Inc. and Jefferson Wireless Limited, and the availability of other primary service to such areas and populations.**

**(20) To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, whether the Fraser or the Golden proposal would better provide a fair, efficient, and equitable distribution of radio service.**

**(21) To determine, in the event it be concluded that a choice between the Fraser and Golden applications should not be based solely on considerations relating to Section 307(b), which of the proposals would on a comparative basis better serve the public interest.**

**(22) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications, if any, should be granted.**

2. By *Memorandum Opinion and Order*, FCC 81M-1307, released April 28, 1981, the following issue was added:

**(23) To determine whether the proposal of Mountain Wireless, Ltd. complies with Section 73.24(j) of the Commission's Rules, and, if not, whether good cause exist for granting a waiver.[10]**

---

[7] Issue 16 was deleted. FCC 81M-1141, released April 16, 1981.

[8] Issue 17 was resolved in the applicant's favor by summary decision. FCC 81M-3345, released October 21, 1981.

[9] Issue 18 was deleted. FCC 81M-1141, released April 16, 1981.

[10] This issue was resolved in the applicant's favor by summary decision. FCC 82M-1398, released May 3, 1982.

The burdens of proceeding and proof were placed on Mountain.

3. By *Memorandum Opinion and Order*, FCC 81M-2352, released July 30, 1981, the following issue was added:

(24) To determine whether Jefferson Wireless, Co.'s 0.5 mV/m contour would overlap with the 0.5 mV/m contour of standard broadcast station KFBC, Cheyenne, Wyoming, in violation of Sections 73.24(b) and 73.37(a) of the Commission's Rules, and if so, whether Jefferson Wireless, Ltd. is qualified to receive a grant of its application.[11]

The burden of proceeding was placed on Grand and burden of proof on Jefferson.

4. By *Memorandum Opinion and Order*, FCC 81M-2444, released August 7, 1981, the following issues were added:

(25) a. To determine whether Robin Theobald engages or has engaged in the illegal use of narcotics and the effect thereof on Dillon Broadcasting Company's basic and/or comparative qualifications to be a Commission licensee;

(26) b. To determine whether Robin G. Theobald harassed and/or discriminated against employees of Breckenridge Broadcasting Company on the basis of sex and, if so, the effect thereof on Dillon Broadcasting Company's basis and/or comparative qualifications to be a Commission licensee.

The burden of proceeding and proof were placed on Levin.

5. By *Memorandum Opinion and Order*, FCC 82M-0860, released March 17, 1982, the following issues were added:

(27) To determine whether the principals of Summit Radio, Inc. filed false affidavits in response to Alan K. Levin's Petition to Dismiss Application and whether John H. Gayer gave false testimony under oath regarding his role in merger negotiations with Alan K. Levin and if so, the effect thereof on the basic and comparative qualifications of Eagle Radio, Inc. and Summit Radio, Inc.

The burdens of proceeding and proof were on Eagle and Summit.

(28) To determine whether Eagle Radio, Inc., Grand Radio, Inc., Summit Radio, Inc., and/or its principals misrepresented facts concerning intra-Gayer family stock transfers in documents filed with the Commission or was lacking in candor concerning these transactions and, if so, the effect thereof on the basic and comparative qualifications of Eagle Radio, Inc., Grand Radio, Inc., and Summit Radio, Inc.

The burdens of proceeding and proof under this issue was placed on Eagle, Grand and Summit. Finally, in this *Memorandum Opinion and Order*, the following issue was added:

(29) To determine whether the proposal of Eagle Radio, Inc. complies with

---

[11] This issue was resolved in the applicant's favor by summary decision. FCC 82M-1398, released May 3, 1982.

Section 73.24(j) of the Commission's Rules, and, if not, whether good cause exists for granting a waiver.[12]

Eagle was given the burdens of proceeding and proof under this issue.

6. The issues that remain to be resolved are summarized as follows:

(1) Issue 1 - Multiple ownership issue against Summit and Grand;

(2) Issue 2 - 73.1120 issue against Summit;

(3) Issue 8 - areas and populations issue involving Levin, Summit and Dillon;

(4) Issue 9 - 307(b) issue involving Levin, Summit and Dillon;

(5) Issue 10 - contingent comparative issue involving Levin, Summit and Dillon;

(6) Issue 19 - areas and populations issue involving Grand and Jefferson;

(7) Issue 20 - 307(b) issue involving Grand and Jefferson;

(8) Issue 21 - contingent comparative issue involving Grand and Jefferson;

(9) Issues 25 and 26 - illegal drug use and sexual harassment issues against Dillon;[12a]

(10) Issue 27 - false affidavits and false testimony issue against Summit;[12a]

(11) Issue 28 - misrepresentation issue against Grand and Summit; and[12a]

(12) Issue 29 - the ultimate issue to determine which if any of the applications should be granted.

7. By *Memorandum Opinion and Order*, FCC 82M-1737, released June 2, 1982, Omaha TV 15, Inc. (Omaha) was granted limited intervention in this proceeding for the purpose of participating in the false affidavit/misrepresentation issue specified against several members of the Gayer family and the applications in which they were principals. Omaha is one of several applicants in the Omaha, Nebraska, television proceeding (BC Docket Nos. 80–691, *et. seq.*) and John H. Gayer is the largest single stockholder (32.5%) in another Omaha applicant, Family Television, Inc.

8. Prehearing conferences were held on February 14, 1981, April 29, 1981, May 8, 1981, July 17, 1981, October 14, 1981, and February 26, 1982. Hearing sessions were held on various dates in October and November 1981 and June 1982. The record was closed by *Order*, FCC 82M-2787, released September 14, 1982. By *Order*, FCC 82M-3331, released October 26, 1982, issue 1 was modified as indicated, *supra*, and the record in this proceeding was reopened for the limited purpose of taking evidence on the effect of the application of Dwight

---

[12] Eagle's application was dismissed pursuant to a settlement agreement. FCC 82M-2499, released August 17, 1982.

[12a] Added issues 25 - 28 will be considered before the 307(b) and contingent comparative issues.

H. Gayer d/b/a Grand Communications Company for a new FM station at Kremmling, Colorado under revised issue 1. On November 15, 1982, Grand submitted exhibits addressing this question. No party requested cross examination on these exhibits. By *Order*, FCC 82M-3686, released November 22, 1982, Grand's exhibits (Exhibit Nos. 9, 10 and 11) were received into evidence, the record in the proceeding was reclosed and a date was established for the filing of supplemental findings.

9. Proposed findings and conclusions were filed October 14, 1982 by Jefferson and Dillon and October 18, 1982 by Omaha, Grand, Summit, Levin[13] and the Mass Media Bureau; replies were filed November 12, 1982 by Levin, Dillon, Summit, Grand, Jefferson and the Bureau. Supplemental findings were filed November 29, 1982 by Summit and Grand. A Supplement to Summit's findings was filed March 23, 1983 by Summit and Comments on Summit's supplement were filed March 28, 1983 by Dillon.[14]

## *Findings Of Fact*

### *Issue 1 - Multiple Ownership Issue*

10. The Gayer family is comprised of John H. Gayer, his wife Dorothy, and their three children, John G., Diane and Dwight. At the time of release of the *Designation Order* (December 1, 1980), members of the Gayer family held interests in the Summit (Dillon-Frisco-Silverthorne), Eagle (Vail), and Grand (Fraser) applications and substantial primary service contour existed among the three proposals and with the Gayers' KBCR, Steamboat Springs, Colorado. The Summit principals included John G. Gayer and his wife Carol; the Eagle principals included John H. Gayer and his wife Dorothy; and the Grand principals included Dwight H. and Diane E. Gayer. John G. Gayer and Dorothy Gayer held stock in Big Country Radio, Inc., licensee of KBCR-AM-FM, Steamboat Springs, Colorado (*Designation Order*, paragraph 2, 4).[15] Also, in August 1980, High Country Television, Inc. filed an application for a new VHF station in Glenwood Springs, Colorado. John H. Gayer held a 34% stock interest in the corporation. Glenwood Springs is within 100 miles of Steamboat Springs, Vail, Fraser and Dillon. Primary service contour overlap existed between the High Country proposed VHF station at

---

[13] On October 19, 1982, Levin filed a "Motion For Leave To File Corrected Proposed Findings And Conclusions of Law." Levin's request to substitute a corrected proposed findings also filed on October 18 is granted.

[14] By *Order*, FCC 83M-1245, released April 14, 1983, the Presiding Judge granted Summit's "Motion To File Supplement" and accepted Summit's Supplement and Dillon's Comments.

[15] At the time of its formation in 1972, Big Country was owned in equal shares by all five members of the Gayer family (*Designation Order*, paragraph 4).

Glenwood Springs, the Steamboat Springs station and the proposed AM stations at Vail, Fraser and Dillon.[16] The Eagle application was dismissed in August 1982 (See *Order*, FCC 82M-2499, released August 17, 1982). Also, the High Country application was dismissed in April 1982 (see BC Docket Nos. 18–665 and 666, FCC 82M-1268, released April 20, 1982). Only the Summit and Grand applications remain to be considered under the multiple ownership issue. In addition, also under consideration are John G. Gayer's application under the name of Fruita Broadcasting Company for an FM station at Fruita, Colorado and Dwight H. Gayer's application under the name of Grand Communications Company for an FM station at Kremmling, Colorado.

### *Summit Radio, Inc.*

11. Summit's application was filed on July 28, 1978. John G. Gayer and Karl Crass each own 50% of Summit. They each contend that they have and will control Summit and that while John H. Gayer has assisted them in certain respects, he has not exercised control over their application nor will he in the future (Summit Ex. 1, pp. 16 and 17; Summit Ex. 2, pp. 9 and 10). John H. Gayer's assistance to Summit consisted of the following. He provided a set of by-laws and articles of incorporation which were used as a model in establishing Summit. John G. and Karl Crass finalized these documents at Station KAAT[17] and the documents were notarized by a KAAT employee, Minnie Tomocich. John G. Gayer contacted Alan Levin, who had already filed an application for Dillon, to set up an appointment for John G. and Crass to discuss a possible merger. The senior Gayer also gave advice on how to approach Mr. Levin. John G. and Crass asked John H. to make inquiries about possible transmitter sites. John H. contacted several realtors and visited two parcels of land. He also wrote to Mr. Gureckis[18] on June 9, 1978, enclosing a site map for Summit and other material. The letter also concerned Radio Vail and Station KAAT. In addition to enclosing a proposed site map for Summit,[19] John H. asked for a price quotation for doing Summit's application (Summit Ex. 3, Att. A). John H. thought at first that he had sent this letter at the request of John G. and Mr.

---

[16] Issue 1 was modified to reflect Gayer's ownership in High Country (*Order*, FCC 81M-1801, released June 11, 1981). Also, Western Slope Communications, Ltd., which had filed a mutually exclusive application for a Glenwood Springs television station was allowed to intervene in connection with the multiple ownership issue.

[17] John H. Gayer was 100% stockholder of Radio Colorado Corporation, licensee of AM station KAAT, Denver, Colorado. The station was sold in the latter part of 1978 (Summit Ex. 3, pp. 3 and 4).

[18] Mr. Gureckis was the engineer for Summit, Grand, Eagle and had done engineering work for Big Country.

[19] This site was not used by Summit (Summit Ex. 3, p. 20).

Crass. However, John G. and Crass did not recall asking the senior Gayer to undertake writing this letter for them (Summit Ex. 1, p. 12, Summit Ex. 2, p. 6, and Summit Ex. 3, p. 20).

12. John H. Gayer, a qualified professional engineer, also assisted Summit by answering engineering questions posed by Mr. Crass and by accompanying John G. to a meeting with a site owner. According to John H., he merely drove his son to meet with Mr. Gallie. John G. stated that he handled the discussions with Mr. Gallie (Summit Ex. 1, p. 13 and Ex. 3). The senior Gayer also accompanied John G. and Karl Crass to the Summit County Bank. John H. stated that he accompanied them because he was acquainted with the bank president. However, upon arriving, they learned that John H.'s acquaintance was no longer with the bank. John H. stated that John G. and Crass met with the new president and although John H. was present, he did not participate in the discussions (Summit Ex. 3, p. 21).

13. John G. Gayer originally proposed to meet his financial commitment to Summit with a $40,000 loan from the Gering National Bank and Trust Company. However, when the Commission raised a question about this loan because of his parents' holdings[20] in that bank, John G. obtained a new commitment from another bank (Summit Ex. 1, p. 16). John G. and Crass both stated that Summit will be financed totally from their own funds (Summit Ex. 1, p. 16, and Summit Ex. 2, p. 8).[21]

14. Finally, John G. stated that any similarity between Summit's application and that of other applications in which relatives have an interest is attributable to two factors. First, the communities applied for are all mountain communities in resort areas. Second, the Gayers are all represented by the same communications counsel (Summit Ex. 1, p. 15).

15. John G. Gayer was born in 1943. He has a degree in electrical engineering from Cornell University. Gayer joined the Link Group of General Precision Company upon graduation from college and assumed increasingly more responsible positions during his almost

---

[20] Mr. and Mrs. Gayer together with other family members control the Gering bank. Mr. Gayer is chairman of the board and Mrs. Gayer is a member of the board (Summit Ex. 3, p. 6).

[21] By letter dated November 10, 1980, John H. Gayer transmitted to his attorney certain ideas concerning this proceeding (Summit Ex. 3, Attachment C). Although the letter refers to possible ownership changes in Summit and another applicant for a broadcast facility, Gayer never discussed his proposals with John G. Gayer or Karl Crass (Tr. 1847). Indeed, John G. Gayer testified that he had no knowledge of the November 10, 1980 letter (Tr. 792), and was shocked and indignant when he saw the letter for the first time, after it had been written (Tr. 912). The record demonstrates that John G. Gayer rejected the ideas reflected in the letter when he learned of them and asked John H. Gayer to not interfere with Summit and to "please stay out of their business" (Tr. 1907). John H. Gayer did not discuss the letter with Dwight and Diane (Summit Ex. 3, pp. 27–30).

nine years with the company. In the spring of 1974, he became general manager of KBCR-FM in Steamboat Springs, Colorado. He also served as general manager of KBCR-AM beginning in 1976 when the station commenced operation. Gayer continued as general manager of these stations until they were sold in June 1981 (Summit Ex. 5).

16. Karl Crass was born in 1948. After attending college for one year, he enlisted in the Army and served in Viet Nam and Germany before being honorably discharged in August 1970. Upon his discharge from the Army, Crass returned to Western State College where he was active in the student-operated radio station. He graduated in 1974, received a First Class Radio-telephone License, and was employed by John H. Gayer at Station KAAT, Denver. After working at KAAT for a short period of time, he moved to Steamboat Springs and helped construct Station KBCR-FM. Crass worked at Stations KBCR AM and FM in numerous capacities including announcing, sales, and equipment maintenance. He continues to work as station manager for the new owners of these stations (Summit Ex. 6).

### *Grand Radio, Inc.*

17. On February 6, 1978, Grand Radio, Inc., filed an application for a new AM station for Fraser, Colorado (Grand Ex. 1, p. 14). It was originally anticipated that Dorothy Gayer and Dwight Gayer would be principals of Grand and that Minnie Tomocich, an employee of Denver AM Station, KAAT, would join them as a director. However, shortly after Grand was incorporated, Dorothy Gayer and Minnie Tomocich decided not to participate. When the application was filed, Dwight was president and treasurer, a director and 50% stockholder; Diane Gayer was vice president and secretary, a director and 50% stockholder; and William Maynard, a Fraser businessman, was a director (Grand Ex. 1, pp. 1, 12 and 13). Both Dwight and Diane Gayer contend they have and will control Grand (Grand Ex. 1, pp. 20–21 and Ex. 2, p. 4).

18. Mr. and Mrs. John H. Gayer have assisted Grand. Mrs. Gayer was originally going to be a stockholder and president of the corporation.[22] She also provided the original $5,000 capital contribution which she subsequently decided to treat as a gift.[23] A letter to the Denver Water Board dated January 17, 1978, concerning a transmitter site for Grand, bore her signature as president of Grand (Eagle Ex. 1, Att. B). However, Mrs. Gayer stated that she did not recall signing the letter and believes she signed it at Dwight's

---

[22] She changed her mind because she was tired of spending time up in the mountains and because counsel subsequently advised Dwight that there might be multiple ownership problems (Tr. 2118 and 2119).

[23] See Eagle Ex. 1, Att. A.

request (Eagle Ex. 1, p. 8). Both Mr. and Mrs. Gayer agreed to personally guarantee a $75,000 loan from the Middle Park Bank to help Dwight and Diane finance the Grand application. They also agreed to loan Grand $25,000. Mr. Gayer accompanied Dwight to the Middle Park Bank when the original loan commitment was obtained (Summit Ex. 3, p. 23, Grand Ex. 1, p. 16). Subsequently, in late 1979 or early 1980, Dwight obtained a renewal of the $75,000 loan commitment from the Middle Park Bank and the personal guarantees of himself and Diane were substituted for that of their parents. Dwight and Diane also substituted their joint personal loan commitment to Grand in the amount of $25,000 for their parents' commitment. In support of this commitment, Dwight and Diane obtained lines of credit for $12,500 each from the Gering Bank. These lines of credit were increased to $15,000 each in January 1981 (Grand Ex. 1, p. 117). Thus, Grand's current financing plans are based solely on the personal resources of its principals and there have been no discussions of any future financial aid from Mr. and Mrs. John H. Gayer (Tr. 2241).

19. John H. Gayer also provided the following assistance to Grand. He recommended legal and engineering counsel, *i.e.*, the same persons he had retained himself (Grand Ex. 1, p. 5). John H. gave advice to Dwight on the names of programs and how they should be described in the application (Grand Ex. 1, p. 6). The programs themselves, however, were conceived by Dwight Gayer (Tr. 2363-65). He assisted Dwight in drawing up a lease contract for the Tellier property and the local law firm that John H. had previously used was retained to advise on the lease (*Id.* at p. 9). John H. accompanied Dwight and Grand director William Maynard to a County Planning Committee meeting. He also served as an engineering consultant and witness for Grand at a hearing before the Board of County Commissioners. John H. obtained equipment proposals for Grand from both Harris and CCA (*Id.* at pp. 10 and 11). John H. gave Dwight articles of incorporation and by-laws which Dwight used as model in forming Grand. Minnie Tomocich, a KAAT employee who was originally to be a director of Grand, prepared these documents (*Id.*). John H. assisted Dwight in taking field strength measurements on Station KFBC, Cheyene, Wyoming, to show there would be no overlap with Grand's proposal (*Id.* at p. 18). Dwight used his parents' address as a mail drop and routinely received correspondence from his attorney and engineer at their residence. John H. Gayer also forwarded or mailed correspondence for Grand (*Id.* at pp. 19 and 20).

20. Dwight Gayer was born in 1955. He obtained a First Class Radiotelephone License in 1974. He worked at Station KAAT in the summer of 1972, assisting in the construction of a transmitter site. Dwight also worked at KAAT in an engineering capacity during the spring of 1974. His first full-time position with a broadcast station was during the summer of 1975 when he worked as an announcer

and account executive for Station KFNF, Shenandoah, Iowa. Both Stations KAAT and KFNF were owned, at least in part, by John H. Gayer. In 1975 and 1976 while a student at Mesa College, Dwight was involved with the college radio station. He served as an announcer and news director of Station KMSA. During this same period of time, Dwight was a duty engineer for Stations KREX-AM and FM, Grand Junction, Colorado. He was also a part-time news reporter at KREX. Dwight worked as a full-time announcer at Station KVMT, Vail, Colorado, from the spring of 1977 to the fall of that year. That station was partially owned by his parents at that time. From April to November 1978, Dwight worked as announcer, news reporter, account executive and engineer at Stations KBCR-AM and FM in Steamboat Springs. Those stations were owned by members of the Gayer family at that time. In April 1979, Dwight returned to Station KVMT, Vail, and served as assistant manager until September 1979. The station was sold in September 1979 and Dwight continued his employment for the new owners as chief engineer until September 1980 (Grand Ex. 5).

21. Diane Gayer was born in 1952. She worked at Station KAAT in 1974, first as a receptionist and, eventually, as the person in charge of the daily logs. In 1975, she worked at Station KBCR-FM developing a series of local interest stories, writing advertising copy, and doing public relations. Ms. Gayer has been a practicing architect since 1979. In addition, she and her husband established their own architectural and interior design company in 1979. Ms Gayer serves as president of that company (Grand Ex. 6).

22. Summit's proposed transmitter site is located at 39° 33’ 03‘ north latitude and 106° 02’ 26‘ west longitude and Grand's proposed transmitter site is located at 39° 58’ 46‘ north latitude and 105° 49’ 27‘ west longitude (File No. BP-780728AN and BP-21,139) (Official notice taken). Calculated according to the method described in §73.208(c) of the Rules, the two antenna sites are found to be separated by a distance of 31.7 miles. Converting the geographic coordinates to polar form, it is found that the direction from Summit's site toward Grand's site is 201° and the direction from Grand's site toward Summit's site is 21°. In the direction of 201°, the distance to Grand's proposed 2 mVm contour is found to be 34.5 miles (File No. BP-780728AN). In the direction of 21°, the distance to Summit's 2 mV/m contour is found to be 25.8 miles. These two contours would, therefore, overlap each other by 28.5 miles along the interconnecting radial. Since the reach of a contour varies inversely with signal strength, the 1 mV/m contour overlap is necessarily greater than 28.5 miles. Should Summit and Grand be found to be under common direct or indirect control, a grant of both applications would be in violation of the 1 mV/m contour overlap provision of Section 73.35(a).

### *Fruita Broadcasting Company*

23. On August 19, 1981, John G. Gayer d/b/a Fruita Broadcasting Company (Fruita) filed an application for a new FM station at Fruita, Colorado. The application for Fruita is solely John G. Gayer's undertaking and is totally independent of any other principal in any applicant in this proceeding and of John H. Gayer. The only assistance provided by John H. Gayer in connection with the Fruita application was on a minor engineering point (Summit Ex. 10 and Ex. 11; Tr. 719-29).

### *Grand Communications Company*

24. On August 25, 1982, Dwight H. Gayer d/b/a Grand Communications Company filed an application for authority to construct a new FM broadcast station at Kremmling, Colorado. The application was filed by Dwight H. Gayer independently (Grand Ex. 9). The only assistance provided by any other member of the Gayer family was the performance of certain mathematical calculations by John H. Gayer (Grand Ex. 9, 10). Dwight H. Gayer will be solely responsible for the financing, programming and operation of the proposed Kremmling station (Grand Ex. 9). No other member of the Gayer family has any interest in the Kremmling application (Grand Exs. 9, 10, 11). The community of Fruita is located over 100 miles from Kremmling, Fraser, Dillon, Frisco and Silverthorne (official notice taken).

### *Issue 25 - Illegal Use of Narcotics Issue*

25. This issue seeks to determine whether Robin Theobald, the President and 100% owner of Dillon, engages in or has engaged in the illegal use of narcotics and the effect thereof on the basic and/or comparative qualification of Dillon to be a Commission licensee.[24] Breckenridge Broadcasting Company operated station KLGT, Breckenridge Colorado from the time the station began program tests on September 12, 1975, until it was sold on June 1, 1979. During that entire period of time, Theobald was the General Manager of KLGT and also did an on-air shift. Initially, Theobald tried to do either the early morning air show, which concluded at 9:00 or 10:00 a.m. or the late night air shift from 6:00 or 7:00 p.m. to midnight. By mid-1978, Theobald was generally doing only the 8:00 a.m. morning newscast (Tr. 2647, 2652–53).

26. Nina J. Atkinson was employed at Station KLGT from February 1978 through March 1979. She served as an announcer and public service director and worked during various air shifts (Tr. 430–32). In late March or early April, 1981, Atkinson was contacted by

---

[24] Levin has the burden of proceeding and proof on this issue. As discussed, *below*, Levin presented the testimony of three former KLGT employees—Nina J. Atkinson, Sandra C. Lindblad, and Pippin Nancy Ross.

Levin and asked whether she would be willing to make a statement concerning "any illegal activities" which may have occurred at Station KLGT during the time of her employment. Atkinson could not recall the details of her conversation with Levin, but "after some consideration" on the matter agreed to furnish an affidavit to Levin (Tr. 471–72). Atkinson gave two affidavits in connection with this case (April 24, 1981 and June 30, 1981) (Tr. 442). Atkinson's motivation for furnishing the affidavits was her dislike of Robin Theobald and his parents and her desire that Robin Theobald not get another broadcast license (Tr. 445, 447).

27. Atkinson claims she observed Theobald use cocaine on at least two occasions in the KLGT control room. Atkinson states that both occurred in September 1978 while she was working the morning air shift and that the circumstances were substantially similar (Tr. 433, 437–439). According to her, Theobald walked into the control room, "pulled out a small vial from his pocket and proceeded to turn it upside down, then put it to his nose and inhaled" (Tr. 433). Atkinson was approximately three feet from Theobald and no one else was present on these occasions (Tr. 433, 456–57). Theobald then offered the vial to her and she put it in her nose and inhaled (Tr. 494). Atkinson did not see Theobald take the cap off the top of the vial or any substance move from the bottle portion to the cap portion (Tr. 456–57).

28. Atkinson states that although Theobald did not tell her that the vial contained cocaine she was led to believe that was the case. Atkinson cannot recall what Theobald said or any response she may have made at the time. She states that Theobald was preparing to go on the air and she was busy operating the control board and wasn't paying much attention (Tr. 439, 457). Atkinson also bases her belief that the vial contained cocaine on her observation of other persons using cocaine and her prior use of the substance. Atkinson was unable to state how often she observed other persons she believed were using cocaine or provide even an approximation of how often she had used cocaine herself (Tr. 474–75, 492). Atkinson had never used a device in the shape of a bullet (Tr. 493). She stated that persons using cocaine seemed to get energetic and seemed to act like someone who has drank two or three pots of coffee. According to her Theobald seemed to perk up after inhaling from the vial (Tr. 474–75, 483–84). Atkinson did not testify as to her physical experience on the two occasions in the KLGT control room when she claims to have used cocaine. Atkinson agreed that there was coffee at the station which she drank "like crazy," and was sure that Theobald had had coffee on the mornings involved (Tr. 484).

29. Atkinson described the vial used by Theobald as consisting of "a small, dark-colored glass bottle, brown, I believe, with a clear, plastic, dome shaped cap, and in the vial, in the brown portion, there appeared to be a white powder" (Tr. 433). Atkinson subsequently

changed her testimony from "white powder" to "light colored powder" (Tr. 436) because the color of the vial makes it impossible to tell whether it was white (Tr. 458). She also conceded that it could have been yellow instead of white and it would not have looked any different in the bottle (Tr. 458). She further conceded that the substance in the vial could have been powdered sugar or baking powder and it would not have looked any different (Tr. 458).

30. On direct examination counsel for Levin showed Atkinson two vials which she identified as being "like the one" Theobald had in his possession (Tr. 434–35). Atkinson stated that the only difference between the vials was that one contained "some sort of white powder" (Tr. 435), while the other device has a "clear liquid" in it (Tr. 436). However, on cross examination, Atkinson admitted that she could not tell by looking at the vials that one contained a white powder. Further, she agreed that it was not possible to state that the liquid was clear-colored (Tr. 459).

31. The device shown by Levin's counsel to Atkinson contains a dome shaped cap and a stop-cock on the side. The vial is $\frac{9}{16}$ of an inch in diameter, 2 $\frac{3}{16}$ inches in height (overall), $\frac{3}{4}$ inch from base of container to base of cap, and 1 $\frac{7}{16}$ inches from base of cap to top of cap. The stop-cock is $\frac{3}{8}$ inch in height and extends outwards $\frac{1}{8}$ inch from the side of the cap (Levin/Dillon Jt. Ex. 3). The vial identified by Atkinson at the hearing conflicts with an illustration she drew as part of her June 30, 1981 affidavit. The illustration did not include a stop-cock on the side of the vial and depicted a container having a base proportionately much larger than the container's cap (Dillon Ex. 3). Atkinson's explanation for her failure to include a stop-cock in her drawing was that [t]he drawing was from memory and [i]t was rather vague (Tr. 451–52) and that she did not recall that detail at the time (Tr. 453). Also, at her September 20, 1981 deposition, Atkinson described the top of the vial "as like the top of a Vicks inhaler" (Tr. 455–56).

32. Sandra C. Lindblad was employed at Station KLGT during the period from July 1978 through February 1979 (Tr. 503, 568, 574). Lindblad cites Theobald's alleged harassment of her as being "the primary reason" why she left KLGT (Tr. 518, 593). Lindblad states that Levin contacted her in February 1981 to obtain an affidavit "to describe the character of Robin Theobald" and that Levin specifically questioned her as to whether Theobald used cocaine. Lindblad volunteered to Levin that she had been "harassed" by Theobald and "was treated bitterly when I worked for him" (Tr. 576–78). Lindblad affirmed in her testimony that her motivation for providing Levin with two affidavits accusing Theobald of illegal use of drugs and sexual harassment was that she was "totally willing" to help Levin in any way she could "because of the way I had been treated" (Tr. 520, 571–72).

33. Lindblad alleges that there were two occasions on which she

observed Theobald use cocaine. On the first occasion, in August 1978, Lindblad states that Theobald drove her to a dance at the Red, White, and Blue Fire Station in Breckenridge, Colorado. Lindblad recalled that it was dark outside (as well as inside the car) and that Theobald parked his car across from the fire station and on the opposite side of the street (Tr. 507, 528, 567). While still inside the car, Lindblad claims that Theobald offered her a vial and asked her if she wanted a "toot" or a "snort" or "something like that, I don't remember the exact words." At any rate, Lindblad states that Theobald led her "to believe . . . that it was cocaine" (Tr. 510–11, 562). Lindblad did not accept the vial or make any use of its contents (Tr. 519, 543–44). Lindblad asserts that Theobald did use the vial by placing it next to his nose and then inhaling. She did not have an opportunity to observe any physical change in Theobald as they immediately went into the dance and were not together during the evening (Theobald was working at the dance) (Tr. 508–509, 511–12). Lindblad described the vial which Theobald is alleged to have used as having "two parts, about an inch and a half high, cone-shaped, about half an inch around circumference" (Tr. 509). Lindblad had no recollection of ever seeing such a vial prior to that occasion in Theobald's car (Tr. 509).

34. Levin's counsel showed Lindblad the same "bullet" device which he had shown Atkinson. Lindblad testified that "[a]s far as I can recall, that [the 'bullet' device] looks like" the vial which Theobald used and that "as far as I can recall, that vial [the 'bullet' device] is similar to the one Robin Theobald had that night"; she also stated that the "bullet" device was "basically the type of apparatus he [Theobald] had" (Tr. 510, 532, 535–36). Lindblad also testified that Levin's counsel had shown her the "bullet" device just prior to her testifying (Tr. 510).

35. Lindblad had previously drawn a sketch of the vial which Theobald is alleged to have used. That sketch was made in connection with her deposition of September 21, 1981 and it shows the cap portion of the vial to be approximately ¼ of the overall height of the vial, the base portion to be about ¾ of the overall size and the sketch does not depict any stop-cock on the side of the vial (Dillon Exh. 4, Tr. 536-37). Lindblad's deposition sketch of the vial Theobald is alleged to have used is similar in detail and proportion to the sketch contained in Atkinson's affidavit of June 30, 1981. (Compare Dillon Ex. 3 with Dillon Ex. 4). Lindblad's deposition sketch, however, is dissimilar in detail and proportion to the "bullet" device which Levin's counsel showed her. (Compare Dillon Ex. 4 with Levin/Dillon Jt. Ex. 1).

36. Lindblad could not recall the color of the vial which Theobald is alleged to have used. However, she has a recollection of seeing the contents of the vial and asserts that the substance in the vial was cocaine (Tr. 532–542, 544). While Lindblad asserts that cocaine was

in the vial, she also concedes that she has no direct proof or knowledge that the substance was, in fact, cocaine (Tr. 544, 562). Lindblad's assertion that Theobald used cocaine on that evening in August 1978 is premised solely upon the fact that Theobald implied by his language that the substance was cocaine. In this regard, Lindblad testified that she believed that the substance was cocaine based on "the different words he [Theobald] used," but that she is "not sure of the exact words" (Tr. 562).

37. The second occasion on which Theobald is alleged to have used cocaine occurred in the control room of Station KLGT during the afternoon, on a day when there was snow on the ground, sometime during the period of late November 1978—January 1979 (Tr. 517, 573, 575). Lindblad states that she was doing an on-air shift when Theobald entered the control room with a box ("probably cardboard") which she could recall only as being smaller than 30 ×24 inches (Tr. 550–51). Lindblad generally recalls that there was a clear plastic bag inside the cardboard box with some substance in it and that Theobald walked to the back of the control room, set the box on the floor, and then inhaled the substance which she believes to be cocaine (Tr. 517–18. 557–58). Lindblad did not recall any other details as she was only looking at Theobald "occasionally" and glanced at him "from time to time" (Tr. 553–54, 556). Specifically, Lindblad testified that:

> I was doing different things at the time, I was doing my job. He [Theobald] was back there in the back of the room. I was walking back and forth. He was doing something, but I don't recall specifically in my mind what it was, but he led me to believe that he was inhaling cocaine.

(Tr. 563–64). Lindbald admits that she has no proof that the substance that Theobald is alleged to have inhaled in the control room was, in fact, cocaine (Tr. 562).

38. Pippin Ross worked at Station KLGT from mid-July 1977 until the end of December 1977 (Tr. 596). In late December 1977, Ross failed to show up for at least one, and possibly two, air shifts, and immediately thereafter either quit or was simultaneously fired by Theobald (Ross maintains that she first quit her job at the station, but concedes that Theobald informed her that she was "fired anyway") (Tr. 607, 633–34).

39. In early 1981, Levin had occasion to contact Ross and she agreed to give him an affidavit concerning her "experiences" at KLGT (Tr. 621). Ross' affidavit originally did not contain any reference to Theobald's alleged use of drugs. Ross included such an allegation only after Levin specifically asked her if she recalled any drug incidents at KLGT involving Theobald (Tr. 621, 625–29). Ross' affidavit of May 6, 1981, contains the following statements relevant to her motivation or state of mind in preparing the affidavit:

> I urge whomever is responsible for making the decision as to which party receives

> this license to do everything possible to assure that it is not Robin Theobald or his family. By doing so, this man will be permanently denied the position and opportunity to work in radio. Therefore, Mr. Theobald will be denied the potential to further abuse the rights, finances, and emotions of his employees.
>
> * * *
>
> I am prepared and willing to provide anymore information necessary in order to permanently remove Robin Theobald from the field of radio.

(Levin Ex. 5, p. 3, Tr. 623–24).

40. After quitting and/or being fired from KLGT, Ross states that she had occasion to be on the KLGT premises approximately three or four times while making social calls on friends still employed at the station. Ross recalls that one of these social calls was in January, in the evening (probably on a Friday or weekend), but that she could not say for sure (Tr. 608–609). Ross alleges that Theobald "was sitting in his office, which was kind of open to the central reception room" and that she could see him from the reception room, either "sitting at his desk or around it or on it" (Tr. 611–12). Ross further states that she walked into Theobald's office, sat down approximately four to five feet from him and, for about 10 minutes, conversed about various music groups that were then playing in the area (Tr. 612–13).

41. Ross contends that during the course of this conversation, Theobald opened his desk drawer and removed a "small, thin, glass container . . . a couple of inches high" which she recalled as being "sort of a goldish kind of a color, and translucent" with a screw top which she thought was black in color. The vial is alleged to have contained a white powder which Theobald scooped out with a little spoon and then inhaled in both nostrils (Tr. 613–15, 616–17). Ross maintains that she did not ask Theobald what he was doing with the spoon and the vial, but that she had seen a spoon and vial used "many times" previously and that the only purpose for which they had been used was "sniffing cocaine" (Tr. 616–17). Ross further states that Theobald did not offer her any of the substance in the vial and that she had never before seen him use cocaine on any other occasion; however, Ross contends that she "seemed to know that he [Theobald] used cocaine" based upon overhearing Theobald on occasion use "typical cocaine kind of talk", such as "got high" or "there is some good cocaine around" (Tr. 617–19).

42. Theobald states that he has used cocaine only on one occassion. In late 1975 or early 1976, he purchased one gram of cocaine from a college acquaintance who was visiting Breckenridge (Tr. 2782–83, 2839). Within approximately one week of its purchase, Theobald used a portion of the cocaine at the home of Diane and Carl Dobrovolny in Blue Ridge, Colorado, and, on this occasion, also offered the Dobrovolnys cocaine (Tr. 2673–74, 2784–85). Theobald was living with his parents at the time and he kept the cocaine at his

parents' house. The only time this cocaine left the Theobald house was on the above-mentioned occasion when Theobald went to the Dobrovolny home (Tr. 2783–88). Sometime after Theobald consumed a portion of the cocaine at the Dobrovolny home, his parents discovered the unconsumed portion and disposed of it upon learning that it was cocaine (Tr. 2838). With the exception of this one occasion described above, Theobald states that he has never used cocaine or offered cocaine to anyone (Tr. 2674).

43. As to the specific accusations of Pippin Ross, Theobald categorically denies that he has ever used cocaine in the presence of Pippin Ross at any time (Tr. 2750). Theobald asserts that after he fired Ross in December 1977, he "never had any communication with her whatsoever" and that he never had occasion to use cocaine in the presence of Ross at any time (Tr. 2749–50). Thus, Theobald contradicts Ross' testimony that after her employment at KLGT had been terminated, she and Theobald had a social conversation during which Theobald inhaled cocaine in her presence. Theobald points out that the physical characteristics of his office at KLGT belie the credibility of Ross' accusations; if he had wanted to engage in an illegal activity, he surely could not have chosen a less indiscreet place than his office. Theobald states that his desk was located immediately in front of and 3–½ feet from a large bay window which extended from approximately 30 inches above floor level to the ceiling (the main bay window was approximately 3 to 4 feet wide, and two adjoining side-windows were each 2 to 3 feet wide). Although the bay window had curtains, the curtains were always open; moreover, the bay window (which was located on the west wall of his office) faced directly on Main Street in Breckenridge, while the entrance door (located on the east wall of his office) opened directly on the main reception area of Station KLGT (Tr. 2718–23, 2736, 2829–30; see also Dillon Ex. 6 (the floor plan of the KLGT studio and offices)).

44. As to Lindblad's accusations, Theobald flatly denies that he inhaled cocaine (or any other white-powdered substance), or that he offered any such substance to Lindblad while she was in his car immediately prior to the Breckenridge Fire Department's No-Man's Land Dance in August 1978 (Tr. 2690, 2767–68). Theobald states that he picked Lindblad up at her apartment at the Red Roost in Breckenridge some time between 7:00 and 7:30 p.m. and drove directly to the fire house, which was located approximately 5 to 6 blocks from Lindblad's apartment. Theobald estimates that the latest he and Lindblad could have arrived at the dance would have been around 7:30 p.m. and states that it was still daylight at this time.[25] He parked his car on the same side of the street as the fire

---

[25] Lindblad testified that it was dark when she and Theobald arrived at the fire station (Tr. 528).

house (so as not to block the fire equipment which was parked on a ramp in front of the fire station)[26] and worked the entire evening as a bartender at the dance (Tr. 2768, 2688–96).

45. As to Lindblad's allegation that Theobald inhaled cocaine in her presence while in the control room of Station KLGT, Theobald categorically denies that this event ever occurred (Tr. 2792). Theobald noted that there were record racks in the back of the main control room (where Lindblad alleges he inhaled cocaine) and that these racks were approximately 15 feet from the control board where Lindblad claims to have been sitting (Tr. 2714–15; see also Dillon Ex. 6).

46. Theobald categorically denies Atkinson's charges that on two occasions in September 1978 (immediately prior to the 8:00 a.m. morning news broadcast), he both used and offered cocaine to her while in the control room of Station KLGT (Tr. 2804–2805). Theobald confirmed that he did the 8:00 a.m. morning newscast during the time Atkinson was an employee of the station and states that there was also a period of time when Atkinson did the morning air shift. Theobald also states that he would have done the newscasts while seated (with his back to Atkinson) at a console in the production room (which is separated from the main control room by a glass partition extending from approximately 30 inches off the floor to within 4 inches of the ceiling and that Atkinson would have been seated at the control board in the main control room (Tr. 2715–18, 2724–25, 2852; see also Dillon Ex. 6).

47. While categorically denying that he ever inhaled cocaine on the premises of Station KLGT, and specifically in the presence of either Ross, Lindblad, or Atkinson, Theobald stated that he frequently inhaled nasal decongestants while on the premises of Station KLGT (Tr. 2647, 2672–73). Theobald's use of nasal decongestants began during his senior year in college when the college dispensary prescribed MTZ for use at night prior to sleep; however, by the time Theobald completed college in the Spring of 1973, he was using MTZ throughout the day as well as at night. Upon completion of college and return to his parents' home in Colorado, Theobald discontinued use of MTZ and began using Neosynephrine, which was available without a prescription (Tr. 2654, 2648). From 1975 through 1977, Theobald continued use of Neosynephrine and also used a Benzedrex inhaler, which is also available without a prescription; the Neosynephrine and Benzedrex inhaler were used concurrently, with Neosynephrine being used on the average of 10 to 12 times a day, and a Benzedrex inhaler being used 14–18 times a day (Tr. 2648). In 1977, Theobald also obtained a prescription for Afrin. Within a few months after obtaining the prescription, Afrin was decontrolled and

---

[26] Lindblad asserted that Theobald parked his car on the opposite side of the street and across from the fire department (Tr. 567).

became available over the counter (Tr. 2648). Theobald found Afrin to be a much stronger decongestant than Neosynephrine and therefore discontinued use of Neosynephrine around Labor Day 1977 (Tr. 2648, 2650).

48. From Labor Day 1977 through March 1978, Theobald used Afrin and Benzedrex inhalers to relieve his nasal congestion. During this period, he estimated that he used Afrin on the average of 5–8 times a day, and eventually increased the frequency to 10–12 times a day; the Benzedrex inhaler was used on the average of 16–18 times a day (Tr. 2650). In March 1978, Theobald began using Sudafed, an oral decongestant available both as a prescription drug and, in smaller doses, over-the-counter (Tr. 2651, 2660–61). From March 1978, Theobald primarily relied upon Sudafed to relieve his nasal congestion and reduced the frequency of using nasal decongestants, *i.e.*, Afrin and Benzedrex inhaler, to once a day on the average, although some days he would use nasal decongestants two or three times a day. Typically, however, Theobald states that he would use a nasal decongestant (rather than an oral decongestant) on specific occasions, such as before a newscast or physical activity when he would not be able to conveniently breathe through his mouth (Tr. 2651–52, 2857–58). Moreover, Theobald states that if he had to use a decongestant at night before going to bed, he would rely upon Afrin rather than Sudafed or a Benzedrex inhaler, since the latter two decongestants had a stimulating effect which impeded sleep (Tr. 2669–71, 2653–54). In the Spring of 1981, Theobald stopped using all oral and nasal decongestants (Tr. 2653).

49. The Benzedrex inhaler used by Theobald is a bullet-shaped container, ¾ inch in diameter and 2–½ inches in height; the height from the bottom of the inhaler to the base of the inhaler cap is 1–⅞ inches, and the height from the base of the cap to the top of the cap is ⅝ of an inch (the base of the inhaler was, thus, three times the height of the inhaler cap). (Levin/Dillon Jt. Ex. 2). The physical shape and proportion of cap to base of a Benzedrex inhaler is similar to the vial device which Atkinson depicted in her affidavit of June 30, 1981 and which Lindblad depicted at her deposition on September 21, 1981. The Benzedrex inhaler is made of a hard, white plastic and is not transparent (Tr. 2662–63). The name of the product and various other information was imprinted directly on the Benzedrex inhaler container rather than on a separate label (Tr. 2864–66). Theobald recalls on occasion using Benzedrex inhalers which he had carried around for up to six months, and that the material which was imprinted on the container had faded or worn in spots (Tr. 2859–60, 2867–68). Theobald observed that if a Benzedrex inhaler has even a portion of the label worn off and the inhaler is held so that the worn portion is exposed, the inhaler would then appear as if it had no printed material on it (Tr. 2877). To use a Benzedrex inhaler, Theobald would first remove the cap and place the domeshaped top

(which has a hole in it) in each nostril and inhale (Tr. 2663). Theobald sometimes turned the inhaler upside down before using it; this was done to draw down the moisture in an impregnated wick, which Theobald believed to be inside the Benzedrex inhaler (Tr. 2754–55).

50. The Afrin container is oval in shape and is 3–$^{7}/_{16}$ inches high, 1–$^{7}/_{16}$ inches wide, and 1 inch deep. The container itself is made of a soft, white plastic (which is not transparent) and there is a hard, red top or cap covering the dome of the container (Levin/Dillon Jt. Ex. 1, Tr. 2661–62). To use Afrin decongestant, Theobald would shake up the bottle, remove the cap, and place the dome area underneath his nostrils, squeeze, and then inhale (Tr. 2662).

51. Dr. Aris Sophocles is a physician in Breckenridge, Colorado. He is board-certified by the American Board of Family Practice and has been engaged in private medical practice as a general practitioner since 1970 (Tr. 3480–82).[27] Dr. Sophocles first saw Mr. Theobald in September 1975 for a sinus congestion problem. He saw Theobald again in 1978 for a headache due to sinusitus which, according to the doctor, was due to a long term dependency on nasal sprays (Tr. 3485–88). In order to wean Theobald from the inhalers, the doctor prescribed Sudafed, an oral decongestant (Tr. 3488). Dr. Sophocles has treated people that used cocaine and considered the possibility of cocaine use in Theobald's case as he always does with nasal congestion (Tr. 3493, 3500 and 3501). However, Mr. Theobald told the doctor that he did not use cocaine (Tr. 3501). The doctor considered Theobald's case a nasal spray dependency problem, not a cocaine abuse case (Tr. 3501). His diagnosis was based on the history of the ailment given by the patient and not on a nasal examination (Tr. 3502). The doctor stated that occasional cocaine use cannot be detected by a physical examination (Tr. 3513–14). He also examined Mr. Theobald in August 1981 and found no evidence of cocaine use (Tr. 3516).

52. Nancie Lyon was an employee of Station KLGT from December 1975 through December 1976; she was not an employee of the station in 1977 and during 1978-1979 worked for the Station at various periods of time (Tr. 2884–85, 2906). During those periods in which Lyon was not a full-time employee of Station KLGT, she did free-lance production work on Station KLGT premises and would also visit employees of Station KLGT on the station's premises. She estimates that during 1977 and other times she was not employed at Station KLGT, she would visit the station five or six times a week and stay for 1-5 hours on each visit or a total of from 5 to 30 hours a week (Tr. 2884–85). Lyon stated that she observed Theobald inhaling from a nose spray bottle which she identified as a benzedrex inhaler

---

[27] Dr. Sophocles has handled drug abuse problems and respiratory problems related to drug overdose (Tr. 3484).

(Tr. 2888–90; Dillon and Levin Jt. Ex. 2). According to Lyon, she never saw Theobald inhale any other substance (Tr. 2891). Lyon stated that she observed Theobald use a nasal decongestant frequently over an extended period of time, including the years 1975-1976 and 1978-1979. He used it before going on the air, according to Lyon (Tr. 2910–14). Lyon stated that she saw Theobald unscrew the cap and use the nasal spray, then put it back in his pocket or desk drawer (Tr. 2919–21). Cocaine was available in the Breckenridge area, according to Lyon, and she had observed people using it (Tr. 2929). Lyon stated that she never saw Theobald use cocaine nor did she see him with a device called a "bullet" (Tr. 2931–32). In Lyon's opinion, a "bullet" resembles a benzedrex inhaler in appearance (Tr. 2932).

### *Issue 26 - Sexual Harassment*

53. This issue seeks to determine whether Robin Theobald harassed and/or discriminated against employees of Breckenridge Broadcasting Company on the basis of sex during that period of time in which the company was the licensee of Station KLGT, Breckenridge, Colorado. The evidence on this issue consists primarily of the direct testimony of Ross and Lindblad and the rebuttal testimony of Theobald.

54. According to Lindblad, Mr. Theobald's behavior toward employees at the station was erratic; sometimes he was friendly and other times abusive, *i.e.*, "he would yell, have temper tantrums occasionally . . .". In mid-winter 1978 (between November 1978 and January 1979), Lindblad accepted an invitation to go out to dinner with Theobald. Lindblad states that Theobald took her to dinner to apologize for yelling at her for opening the curtains in the office of the radio station (Tr. 512–516, 573–576). On the way home from dinner Theobald asked her to spend the night with him. She declined his invitation and there was no further discussion of that matter the rest of the evening (Tr. 515–16, 523). According to Lindblad, after she refused Theobald's invitation to spend the night with him, Theobald's on the job treatment of her became progressively more abusive (Tr. 517, 520). Lindblad worked at KLGT from July 1978 to February 1979.

55. Lindblad states that the alleged sexual harassment did not begin until after she refused Theobald's invitation, since prior to that time Theobald "generally treated me abusively sometimes, and not, generally, civilly sometimes, but it seemed to intensify after that rejection . . . ." (Tr. 575). The only example which Lindblad cites as demonstrating this "more abusive" treatment which occurred after her rejection of Theobald is that on the Monday following her rejection, Theobald had occasion to "come down hard" on her over a specific news story she was doing concerning the proposed airport near Breckenridge. Lindblad had interviewed Scott Gould, a local

politician, and prepared a news item on his comments. Lindblad states that Theobald was critical of the news item and the accuracy of Gould's statements (Tr. 583). Lindblad states that there was also other occasions after her refusal to spend the night with Theobald when he questioned her news judgment and reprimanded her for a misspelled word, but no details as to these alleged incidents of harassment were provided. Lindblad concedes that Theobald never made any reference to her rejection of his invitation to spend the night (Tr. 583–85). In addition Lindblad states that there has never been an occasion on which Theobald tried to physically harm her and she has no knowledge of Theobald ever trying to impose himself sexually on anyone at any time (Tr. 525, 527).

56. Ross[28] states that Theobald would get incredibly angry with her, yell, scream, and use obscenities and profanities towards her (Tr. 599–600). However, Ross also states that Theobald's outbursts were short-lived since in the next instance he would be "very nice, as though nothing had happened." (Tr. 602). Ross states that Theobald's outbursts at her were not continuous, but occurred on the average of once every two or three weeks (Tr. 644–45). Ross also states that Theobald yelled at other employees of KLGT and did not single her out specifically (Tr. 603). At no time did Theobald ever strike Ross or make any sexual advances to her (Tr. 602, 651). Ross observed that during the time she was employed at Station KLGT, women comprised approximately 75 percent of the station's staff (Tr. 604). Ross asserts that Theobald, in her opinion, was "a lot harder on women," but she offered no evidence in support of this opinion. In this connection, Ross never personally observed Theobald in a verbal confrontation with a male employee (Tr. 605).

57. Nina Atkinson, who was employed at KLGT from February 1978 through February 1979, testified that during the period she was employed there, she was not sexually harassed or discriminated against by Theobald (Tr. 484–85). According to Nancie Lyon, Theobald did criticize her work; *e.g.*, that she spoke too quietly, but he was professional and never yelled at her or used obscenities (Tr. 2886 and 87). In her opinion, Theobald treated male and female employees in the same manner (Tr. 2893). Lyon stated that she dated Theobald in the past (Tr. 2906–09). She also stated that she never knew of any EEO complaints against the station (Tr. 2914–18).

58. Robert A. Theobald is Robin Theobald's father[28a] and was 50 percent owner of Breckenridge Broadcasting Co. His law offices were in the same building as the radio station (Tr. 2942–44). Robert Theobald knew of and was present at many disagreements between

---

[28] Ross worked at KLGT from July 1977 to December 1977.

[28a] By *Order* , released December 10, 1982 (FCC 82M-3937), the Presiding Judge accepted an amendment reporting the death of Robert A. Theobald.

his son and employees of the station (Tr. 2945). He has heard his son shout at station employees (Tr. 2951).

59. Theobald acknowledges that he often shouted loudly at employees about their job performances (Tr. 2800–02). He states that the occasions on which he shouted at both male and female employees were frequent (Tr. 2800–01). He states that he had problems with Lindblad's news reporting because of a difference of opinion on how to cover news items. In this regard, Theobald states that the Gould news item which Lindblad prepared presented only Gould's viewpoint and that the news item was inaccurate. Theobald considered the story to be a bad job of reporting which reflected poorly on KLGT (Tr. 2685–87). Theobald further states that during the period Lindblad was employed at Station KLGT, Lindblad's job performance did not improve but remained essentially the same. Theobald stated that he probably became more critical of Lindblad's job performance in the later period of her employment due to the fact that she showed no improvement (Tr. 2765–66). However, Theobald categorically states that his treatment of Lindblad did not change because she declined to spend the night with him (Tr. 2698).

60. Robin Theobald states that he dated Lindblad on two occasions. The first time was at the No-Man's Land Dance in August 1978. After the dance, according to Theobald, Lindblad invited him to her apartment and he declined (Tr. 2688–2692). On the second occasion, around Christmas 1978, Theobald took Lindblad out to dinner. According to Theobald, he asked her if she was going to spend the night and she declined. Theobald stated that after she declined his offer, there was no further discussion of the topic (Tr. 2692–51 and 2773–5) and no hard feelings (Tr. 2776). Lindbald gave notice that she was leaving because of money and made no mention of sexual discrimination (Tr. 2708–9). Theobald states that Lindblad and Diane Dobrovolney, who was second in command at the station, often had disagreements and he assumed this had something to do with Lindblad's leaving (Tr. 2794–97).

61. Theobald states that Ross was an "impossible" employee who could not be relied upon to follow instructions. For example, Theobald states that Ross refused to play records on the play list, made snide remarks about commercial spots and PSA's, and made derogatory comments about advertisers. When Ross persisted in refusing to broadcast the record play list, Theobald told her that she would be fired as soon as he could find a replacement (Tr. 2726–28). Theobald terminated Ross' employment, even though he had not found a replacement for her, when she failed to show up for work on two consecutive days (Tr. 2730–31).

### *Issue 27—False Affidavit/False Testimony Issue Against Summit*

62. This issue concerns whether the principals of Summit and John H. Gayer misrepresented facts or lacked candor in statements

and testimony. Specifically, the issue centers on the phrase "a matter of convenience" in affidavits filed by John G. Gayer and Crass and John H. Gayer's role in the preparation of a proposed merger agreement tendered to Levin and the fact that the affidavits made no mention of such participation.

### *"Matter of Convenience"*

63. On November 15, 1978, Levin filed a Petition to Dismiss the application of Summit (Western Slope Communications, Ltd. Ex. 19). Levin's Petition alleged that Summit's application was "controlled" by John G. Gayer for purposes of the Commission's Rules relating to multiple ownership and regional concentration of control of broadcast facilities. Levin argued that Summit's application could not be granted because that would result in John H. Gayer having "control" of three broadcast stations where any two are within 100 miles of the third and there is primary service contour overlap of any of the stations.[29] As support for his position, Levin noted, *inter alia*, that it was John H. Gayer "who initiated the discussions with Levin." (Levin's Petition to Dismiss, p. 7).

64. As part of its opposition to Levin's Petition to Dismiss, Summit filed affidavits of its two principals, John G. Gayer, Karl Crass, and of John G. Gayer's father, John H. Gayer (Western Slope Communications, Ltd. Ex 16, 20, Levin Ex. 7). Each affidavit addressed Levin's contention that "control" of Summit by John H. Gayer was indicated by the fact that John H. Gayer made the first telephone contact with Mr. Levin. Thus, in each of their affidavits, John G. Gayer and Karl Crass explained that they requested John H. Gayer to make the initial contact with Mr. Levin on their behalf (Western Slope Communications, Ltd. Ex. 16, pp. 2–3, Levin Ex. 7, p. 3). Both John G. Gayer and Karl Crass stated that they asked the senior Mr. Gayer to make the contact with Mr. Levin "as a matter of convenience" to them, noting that Mr. Levin and John H. Gayer both lived in Denver and John G. Gayer and Karl Crass lived in Steamboat Springs, Colorado (Western Slope Communications, Ltd. Ex. 16, pp. 2–3, Levin Ex. 7, p. 3). The senior Mr. Gayer also stated in his affidavit that he called Mr. Levin at the request of his son and Karl Crass (Western Slope Communications, Ltd. Ex. 20, p. 9).

65. Crass stated that he used the term "convenience" because it described the way he and John G. felt about asking John H. to make the first contact (Tr. 3746). At the time he prepared the affidavit, he had read Levin's Petition to Dismiss Application and he understood that Levin was trying to suggest that there was some great significance to the fact that John H. Gayer had called him initially.

---

[29] The other two stations alleged by Levin to have been under the "control" of John H. Gayer, KBCR (AM) in Steamboat Springs, Colorado and KVMT (FM), in Vail, Colorado, have been sold and are no longer owned by any member of the Gayer family.

He understood that Levin was attempting to use this fact to prove that John H. Gayer had some undisclosed ownership interest in the Summit application (Summit Ex. 15, pp. 1–2).

66. Crass intended in his affidavit merely to say that John H. Gayer had no ownership interest in Summit and was asked to set up a meeting with Levin only as a convenience to Crass and John G. (Tr. 3744–45). The fact that John H. Gayer lived in Denver did play a part in Crass' thinking (Tr. 3742). In addition, he felt John H.'s experience would be helpful (Tr. 3744). Crass did not attach great significance to his use of the word "convenience" nor did he see the need to state more precisely in the affidavit why he and John G. had asked John H. Gayer to contact Levin. The point of stating that they asked John H. Gayer "as a matter of convenience" was to make clear that John H. Gayer had no interest of his own in the proposed radio station as Levin was trying to have the Commission believe (Summit Ex. 15, p. 2). When he prepared his affidavit, Crass was focusing on the fact that Levin was trying to imply that John H. Gayer was engaged in something more than doing them a favor. Crass was concerned with making it clear in the affidavit that John H. Gayer contacted Levin only because he and John G. had asked him and that John H. Gayer helped them out only at the request of and as a convenience, or favor, to John G. Gayer and Karl Crass (Summit Ex. 15, pp. 2–3).

67. John G. Gayer stated that he used the word "convenience" to mean that it was easier for him and Karl to have John H. make the initial contact with Mr. Levin (Tr. 1207). Since Levin had argued that this contact was an indication of John H. being in some way involved in the Summit application, the point John G. was trying to make in his affidavit was that his father's initial contact with Levin was not an indication that the father was a party to the Summit proposal, but that the father made the contact at his son's and Crass' request simply because they thought it would be easier for them (Summit Ex. 14, p. 2). In addition to John G. Gayer's uncertainty as to how to approach Mr. Levin, his father being located in Denver was also a factor (Tr. 1208). John G. stated that his father could track Mr. Levin down more easily and that Mr. Levin would be more likely to return a local call than one from Steamboat Springs. Additionally, John G. had some apprehension about approaching Levin (Summit Ex. 14, p. 1; Tr. 1210).

68. John H. Gayer confirmed that he contacted Levin at the request of his son and Karl Crass (Tr. 1725). He did not recall any discussion with them about specific reasons why they wanted him to contact Levin, (Tr. 1726), but understood that it related to the fact that he and Levin both lived in Denver. In his affidavit, deposition testimony and at the hearing, John H. Gayer testified in considerable detail as to his activities in contacting Mr. Levin (Eagle Ex. 7, p. 1).

### *The Merger Proposal*

69. This aspect of the issue involves events which occurred on May 3, 1978 at John H. Gayer's office at Station KAAT in Denver prior to a meeting that day between John G. Gayer, Crass and Levin. As previously discussed, prior to May 3, John H. Gayer contacted Levin at the request of his son and Karl Crass. Gayer told Levin that he was calling on behalf of persons interested in filing an application for Dillon, and advised Levin that those persons were interested in the possibility of merging with him. Levin expressed interest and arranged to meet with John H. at his office at the studios of radio station KAAT in Denver. At that meeting, John H. told Levin that the persons interested in Dillon were his son, John G. Gayer, and Crass (Tr. 1724–27). He also told Levin that in his opinion a merger would make sense (Tr. 1727). At this same meeting, Levin gave Gayer a copy of the engineering portion of Levin's application which Gayer sent to his son and Crass (Tr. 1726). Gayer told Levin that his son and Crass would be in touch with him. Later, at the request of Crass and John G., John H. set up a meeting for May 3, 1978 (Summit Ex. 3, pp. 14–15; Eagle Ex. 7, p. 2).

70. On the morning of the meeting, John G. and Crass drove from Steamboat Springs to Denver. John G. and Crass came to John H.'s offices at Station KAAT and requested some advice as to how they should approach Levin (Tr. 1730). John H. gave them some general advice in this regard. While at the KAAT studios, John G. and Crass prepared a merger proposal that they later presented to Levin at their meeting. Although John H. does not specifically recall seeing the document or discussing it with them before their meeting with Levin, he assumes there was some exchange of ideas with John G. and Crass about the merger proposal and some aspects of the document may have been mentioned to him. However, he testified, it seems to him that this may have occurred in the car on the way to Levin's office rather than at the KAAT studios (Tr. 1732). In any event, John H. recalled that during the time John and Crass were preparing the document in his office, he was engaged in doing a number of other things relating to Station KAAT (Tr. 3959), and the only specific suggestion he could recall giving them was that they inquire into Levin's background before getting into a merger. He did not recall actually sitting down and discussing the proposed agreement with them. The three of them then proceeded to Levin's office together. Once there, Crass and John G. met with Levin while John H. met with another individual, Mr. Hatch, concerning John H.'s other broadcast interests (Eagle Ex. 7, pp. 2–3); Summit Ex. 3, pp. 15–16).

71. John G. stated that his father's involvement in the preparation of the proposed merger agreement was "not substantial" (Summit Ex. 14, p. 3). According to John G., he and Crass had agreed

on the basic terms of the proposal before they arrived at KAAT offices. They prepared the final form of the proposal at the KAAT offices with the help of a secretary there. John G. recalled that his father was present in the room much of the time while he and Crass wrote the memorandum. John G. also recalled discussing with his father how he should approach Levin at the meeting (Summit Ex. 14, p. 3). John G. also testified that his father was in and out of the room and on the phone much of the time while he and Crass worked on the memorandum (Summit Ex. 14, p. 3; Tr. 1212). In fact, John H. was so pressed with the business at KAAT that John G. and Crass spent only a total of ten minutes with John H. (Tr. 1212).

72. Crass testified that he and John G. had some notes and ideas as to the basic structure of a proposed merger with Levin and they brought them to the KAAT offices on May 3, 1978 to prepare a final version of the document (Tr. 1279). Crass stated that although he recalled John H. giving him and John G. advice (Tr. 1282), it was not a situation where the three of them sat down together to write the memorandum. The basic terms had already been decided by John G. and Crass and they went to the KAAT studios in Denver to have the memorandum typed before their meeting with Levin. They were in John H.'s office when they put the memorandum in final form and John H. was physically present most of the time John G. and Crass were working on it. Though John H. was occupied in doing other things, it was Crass' recollection that from time to time either John G. or Crass asked John H. for advice on the wording of a sentence or for his ideas as to what should be in the memorandum. Crass also testified that the extent of his and John G.'s discussions with John H. that morning were limited and were not of great significance to Crass at the time (Summit Ex. 15, pp. 3–4). When Crass prepared his affidavit in opposition to the Levin Petition, Crass did not think John H.'s participation in the merger proposal warranted any mention (Tr. 1276).

### *Issue 28 - Misrepresentation Issue Involving Grand and Summit*

73. This issue concerns whether John H., John G. and Dwight Gayer misrepresented facts or were lacking in candor in documents filed concerning intra-Gayer family stock transfers. Although, as discussed, there were a number of intra-family transfers, the transaction under scrutiny involves the December 1977 transfer of 1000 shares of Big Country stock from Dwight and Diane Gayer to their brother, John G. Gayer.

74. Big Country was organized by John H. Gayer in 1972, when John H. paid in $5000 for 5000 shares and gave each family member 1000 shares. When Big Country merged with a competing applicant in 1976, it was reorganized and the amount of the outstanding stock was increased from 5000 to 8000 shares. William Dunaway, the principal shareholder of the competing applicant acquired 2000

shares of Big Country stock or 25 percent. John G. purchased an additional 1000 shares from the company in exchange for concelling $1000 of a $5000 debt which the company owed him. In addition, John G. acquired another 500 shares of Big Country's stock from his sister, Diane, and his brother, Dwight and Dorothy Gayer acquired 500 shares, also from Diane and Dwight. John G. did not pay Diane and Dwight anything for these shares (Summit Ex. 1, pp. 3–4; Summit Ex. 14, pp. 4–5). On December 31, 1977, Dwight and Diane Gayer transferred their remaining shares in Big Country (500 each) to John G. Gayer. Finally, on July 22, 1978, John H. Gayer transferred his 1000 shares in Big Country to his wife, Dorothy. As a result, Dorothy, William Dunaway and John G. were the only shareholders of Big Country as of July, 1978 (Summit Ex. 14, pp. 5–6).

75. John H. Gayer had, in December 1977, requested Dwight and Diane to relinquish their remaining 500 shares each of Big Country stock to their brother. As in the case of the earlier 1976 transfers, Dwight and Diane received no money for agreeing to make the transfer. They received only a promise from their father, about the time of the second transfer, that they would receive some money for relinquishing their stock when the Steamboat Springs, Colorado stations were sold or when they needed the money (Eagle Ex. 7, p. 7; Grand Ex. 8, p. 3; Tr. 2173, 3852). In late December 1980 or early January 1981, John H. Gayer gave Dwight and Diane each $15,000 (Tr. 3652–53, 3658; Grand Ex. 2, p. 5).

76. The $15,000 given to Dwight and Diane was John H. Gayer's estimate of what the Big Country stock was worth and what they could receive if it was sold to a third party (Summit Ex. 3, p. 27; Tr. 3907). However, according to John H. Gayer, the $15,000 was not consideration for surrendering the stock but rather his desire to compensate them since John G. was getting additional stock and they were losing their opportunity to sell the stock (Tr. 3916–17). In this connection, John H. Gayer stated there was a verbal understanding requiring a Gayer family member to obtain the consent of other family members before selling Big Country stock to third parties and requiring such stock to be sold to another family member only for par value ($1.00 a share) (Tr. 3907–08, 3933–34). The payment was made in late December 1980 or early January 1981 because at that time it appeared that they were about to sell the Steamboat Springs stations[30] and also because Dwight Gayer had asked for the money. Although Diane Gayer had not asked for the money, he decided to make payment to her at the same time (Tr. 3954–55). John H. Gayer stated that there was no discussion at the time of the payments whether the $30,000 could aid Dwight and

---

[30] The agreement to sell the station was executed in January 1981, although not consummated until June or July 1981 (Tr. 3912–13).

Diane in meeting the financial issue designated against Grand (Issue 15).[31]

77. On August 12, 1976 and again on January 31, 1978, John H. Gayer, as President of Big Country filed ownership reports with the Commission (Western Slope Exs. 17, 18). On September 1, 1978, John G. Gayer, then President of Big Country, filed an ownership report with the Commission (Western Slope Ex. 2). Those reports disclosed, *inter alia*, the transfer of shares in Big Country from Dwight and Diane to Dorothy and John G. Gayer and John H. to Dorothy Gayer. Although no money changed hands among family members each filing reported a consideration of $1.00 per share, the par value of the stock.

78. John H. Gayer reported $1.00 per share as consideration since that was the amount he paid for the stock when the corporation was initially set up in 1972 and no new consideration had changed hands (Eagle Ex. 7, pp. 6–7).[32] At the time of the distribution of 1000 shares to each member of his family, John H. Gayer intended that the $1000 would be paid back to him when the Steamboat Springs station was sold or a family member could afford to repay the amount (Tr. 3901). At the time of the filing of the 1978 ownership report reflecting the transfer of 1000 shares from Dwight and Diane to John G., the stock distributed in 1972 was not considered to be either a loan or a gift and no decision had been made as to how the stock would be treated (Tr. 3854, 3872, 3901). In fact, the decision to treat the stock as a gift was not made until 1982 (Tr. 3951). John H. Gayer stated that he probably should have written in "zero" in line 7 of the ownership report filed in 1978 (as well as 1976) since no money had changed hands between John G. and Dwight and Diane. He felt, however, that treating the transaction as a transfer at par value was correct since Dwight and Diane had not paid for the stock and John G. still owed him the money for such stock (Tr. 3857–58, 3902).[33]

79. On November 15, 1978, Levin filed a petition to dismiss Summit's application (Western Slope Ex. 18). Therein, it was alleged, *inter alia*, that Dwight and Diane sold their interest in Big Country

---

[31] See *Designation Order* released December 1, 1980.

[32] John H. Gayer, as President of Radio Vail, Inc., licensee of KVMT, Vail Colorado submitted ownership reports dated June 23, 1976 and April 26, 1978. The 1976 ownership report reflected that Dorothy Gayer had acquired 5000 shares of Radio Vail stock from the Estate of Paul Uhich and paid $3,750 for the stock. The 1978 ownership report reflected that John H. Gayer and his wife had acquired additional shares from John Hobson and set forth the amount paid for the stock (Omaha Ex. 2, 3). However, neither of these transactions involved an intra-family transfer.

[33] Similarly, the 1978 ownership report prepared and filed by John G. Gayer for Big Country also showed $1.00 for each share transferred to his mother. This information was supplied to John G. by his father who had made the transfer (Summit Ex. 14, pp. 5–6).

to John G. on December 31, 1977 for a total price of $1000 (*Id.* at p. 3). At page 6 of his affidavit submitted in opposition to Levin's petition, John H. stated as follows:

> Since the inception of Big Country Radio, my son, John, has been an officer, director and substantial stockholder in the corporation. *He has purchased additional stock in the corporation from me or other members of our family so that his present ownership is 43.7%.* He is the largest single stockholder in Big Country Radio. As I noted before, he has devoted his full time to his broadcasting career since 1974 when he first moved to Steamboat Springs, Colorado. It has always been our intention to assist our son, John, in establishing himself in the broadcasting industry. For this reason, Big Country Radio was formed and filed the application for an FM Station at Steamboat Springs. Big Country Radio filed its application for a new standard broadcasting station at Steamboat Springs to further enhance the opportunities for my son, John, in broadcasting. (Emphasis supplied.).

Eagle Ex. 7, pp. 4–5).

John H. stated that "purchase" was a poor choice of words and that "obtained" would be a better word (Tr. 1472–73, 1486, 1489, 3871–72). The word "purchase" was not intended to mislead anyone (Tr. 3871). John H. Gayer explained that he used the word "purchase" since at the time the affidavit was prepared in 1978, it had not been decided that the stock would be treated as a gift and the $1000 cost for the stock had to be accounted for (Tr. 3874). His statement that John G. had purchased the stock was consistent with his thinking that John G. owed him money for the stock formerly held by Dwight and Diane (Tr. 3888, 3899).

80. On January 9, 1981, Levin propounded interrogatories on Eagle, Summit and Grand. Levin's interrogatory 5(i), which was served on all three applicants, stated, in relevant part, as follows:

> 5. Identify every authorized or existing broadcast station in which one or more members of the Gayer family have any ownership interest and/or official relationship and state with respect to each such station:
>
> (i) the past interest and/or office of each Gayer family member in the permittee or licensee, when such interest was acquired and/or such office assumed, when such interest and/or office was relinquished, to whom such interest and/or office was relinquished, the reason such interest and/or office was relinquished, and the consideration paid or promised for the relinquishment of such interest; (Western Slope Ex. 21, p. 5).

81. John H. Gayer as President of Eagle signed Eagle's response to these interrogatories on January 30, 1981 (Western Slope Ex. 22). Eagle's answer to interrogatory 5(i) included the following:

> All stock was purchased at par value. John H. Gayer, Dwight Gayer and Diane Gayer relinquished their interest/office [in Big Country] to devote time to other business endeavors (Western Slope Ex. 22, p. 18).

John H. Gayer did not report the $15,000 payments to Dwight and Diane in answering the interrogatories because these payments were gifts to them and not consideration for giving up the stock. He made this gift to them since John G. had received additional stock worth $15,000 and they had lost their opportunity to sell the stock. He wanted to treat his children equally (Tr. 3915–19, 3921–23). John H. Gayer conceded he probably should have mentioned the $15,000 payments in answer to interrogatory 5(i) but did not do so since he did not relate the payments to Dwight and Diane's agreeing to transfer their stock to John G. Instead, he treated the transfer consistent with the way he previously reported them, *i.e.*, on a cost basis (Tr. 3918–19).[34]

82. John G. Gayer prepared Summit's answer to Levin's interrogatories. Summit's answer to Levin's interrogatory 5(i) did not contain a response to the portion of the interrogatory which dealt with the consideration paid for intra-family transfers (Tr. 3789). John G. stated that in answering Levin's interrogatory number 5(i) on behalf of Summit, he inadvertently omitted a description of consideration paid (Tr. 3798). John G. intended to answer Levin's interrogatories fully (Tr. 3792).

83. Dwight Gayer prepared Grand's response to Levin's interrogatory 5(i). Since the question called for information about broadcast interests held by other members of his family, Dwight talked to his family about it (Tr. 3653). He learned from his father, John H., and brother, John G., that Eagle Radio, Inc., and Summit Radio, Inc., respectively, had been asked the same interrogatory (Tr. 3653). He asked his father and his brother, who was then running Big Country, for the information he needed to answer the interrogatory (Tr. 3653). John H. supplied Dwight with the following information that he put in Grand's interrogatory response: the percentages of Big Country stock held by each member of the Gayer family, the offices in the corporation held by each member of the family, and the dates during which these offices and/or stock were held (Grand Ex. 8, p. 2). Included was the statement that "All stock was purchased at par value cost" (Omaha TV, Inc., Ex. 1; Tr. 3655–56). Dwight put this statement in Grand's response to the interrogatory, based on his belief that the information given to him by his father was a proper response to the interrogatory (Tr. 3663). Dwight assumed that the information given to him by his father was correct (Tr. 3671). In fact, this information, which he put in Grand's answer, simply repeated information from Big Country's ownership reports which was meant to show that all the family stock had been initially purchased from the corporation for $1.00 per share by his father (Grand Ex. 8, p. 3). At the time he drafted Grand's response to the interrogatory, Dwight did not think back to the events at the time of the stock transfers (Tr.

---

[34] John H. Gayer disclosed the facts concerning the payments to Dwight and Diane Gayer during the depositions taken in June 1981 (Tr. 4006).

3662). It did not cross his mind that the $15,000 payment to him was related to the transfer of stock to John G. Gayer (Tr. 3722).[35] Dwight further testified that his failure to focus on the question asked in Interrogatory No. 5(i) and to submit a more complete answer to Interrogatory No. 5(i) was completely unintentional. The fact that these stock transfers were gifts and not purchases for which money was paid, is not something that he had any reason to want to hide or conceal from the Commission (Tr. 3680–81; Grand Ex. 8, p. 4).

84. As noted, *supra*, the Designation Order released December 1, 1980 specified a financial issue against Grand. Grand submitted an amendment as of right on January 22, 1981 which included a revised financial proposal (official notice taken). Grand sought to meet the financial issue by submitting (1) a new bank loan for $75,000; (2) a stockholder loan for $25,000; and (3) additional stock subscription of $10,000. The stockholder loan of $25,000 was backed by two unsecured lines of credit each in the amount of $15,000, or $5000 more than necessary. The bank letter establish that these lines of credit were extended to Dwight and Diane on December 12, 1980, *before* they received the $15,000 payments from their father in late December, 1980 or early January, 1981 (Tr. 2200–01, 3652, 3657, 3662). In addition, the $10,000 new subscription for stock could have been met by Dwight who had $21,000 in cash ($6000 more than the $15,000 payment, Diane's cash of $17,210 ($2210 more than the $15,000 payment) and the $5000 unused balance of the $30,000 unsecured line of credit. Thus, the $15,000 payments to Dwight and Diane were not necessary for Grand to meet its financial issue. Indeed, Diane Gayer testified that six months after she received the $15,000 from her father she used $10,000 to pay off a note on her house (Tr. 2178–2179). Moreover, with the net deferred credit of $77,747 from Grand's equipment supplier, Grand's total resources were $189,047, about $26,000 more than necessary to meet total costs of construction and first three months operation of $163,950.

### *Issue 6 - Section 73.1120 Issue Against Summit*

85. Issue No. 6 requires Summit to either demonstrate compliance with the provisions of Section 73.1120 of the Rules[36] or, in the alternative, to demonstrate that circumstances exist which would warrant a waiver of the provisions of that section of the Rules. On

---

[35] Dwight Gayer did not know the particulars of any payments between his father and sister (Tr. 3679).

[36] Section 73.1120(b) requires AM applicants proposing to serve multiple communities to show (a) that a satisfactory main studio is provided for each community, (b) that the station can and will provide a substantial number of local live programs from each community and (c) that the program origination requirements of Section 73.1130 (more than 50 percent of a station's non-network programs be originated from a station's main studio) would place an unreasonable burden on the station if it were licensed to serve only one community.

January 22, 1981, Summit amended its application as a matter of right and requested waiver of Section 73.1120(b) of the Commission's Rules with respect to its request for tri-city licensing.

86. The communities of Dillon, Frisco, and Silverthorne are located around Dillon Reservoir. Dillon is located at the north end of the reservoir, Silverthorne is immediately southwest of Dillon (its boundary is contiguous to Dillon) and Frisco is on the western edge of Dillon Reservoir, approximately 3–½ road miles southwest of Dillon. All are located in Dillon County (Jt. Ex. 1, Engineering Statement, Figure 1; Summit Ex. 7, p. 1; Tr. 1019–20).

87. The economy of each community is based on tourism and recreational activities. They are part of the same county school district and share junior and senior high schools. One common concern is the water level of Lake Dillon, which is maintained by the City of Denver Water Board. The County provides services to each community, *i.e.*, housing, planning, social services and senior citizens services. Each town has its own fire and police departments, although a mutual aid agreement is in existence. Residents of the three communities belong to the same civic groups and churches and many travel between the three towns to work. Dillon, Frisco and Silverthorne participate in a county wide movement to promote tourism. Silverthorne and Dillon have cooperated in constructing a joint sewer authority and have established a joint Chamber of Commerce (Summit Ex. 7, pp. 1–7).

88. Summit proposes to locate its main studio at its transmitter site which is, respectively, 10 miles from Dillon and Silverthorne and 3 miles from Frisco. The studio is accessible to the three communities by bus service during the ski season. The bus runs, at most, four times a day. The only other public transportation available is taxi service (Tr. 1047–1050). Summit did not conduct any studies which showed that it would not be feasible economically to establish studios in each of the three towns. Summit's principals determined, after adding up the cost figures, to establish only one studio (Tr. 1028).

89. Summit's proposed programming includes "Summit County Today", a half hour interview program with community leaders, which will attempt to have leaders in certain fields from all three communities present for interviews;[37] "Recreation Facilities," a three minute program on available recreational opportunities broadcast twice daily with emphasis in the winter on skiing, and in the summer on camping, fishing, and boating; "Road Reports," a 30-second to two-minute report every 20 minutes during severe winter storm conditions, and less frequently during good weather to advise area residents of driving conditions including Tunnel traffic conditions; "City Reports," a weekly five-minute report from each of the

---

[37] Summit intends to develop this program into a one hour program and include telephone call-ins from the public (Tr. 1167).

towns by the mayor or city manager of Dillon, Silverthorne, and Frisco on developments and actions taken by the city governments; "County Report," a weekly five-minute report by a county official of the activities taken by the county government and planning commission; "Community Calendar," a three-minute report on events and meetings occurring in Summit County in town meetings, religious events, social events, and special events open to the public;[38] "Forest Service Report," a five-minute weekly report done in conjunction with the Forest Service to inform the public of activities and future plans of the forest service; and "Job Service Report" a listing of employment opportunities available within the county (Tr. 1167–69). Summit does not propose any remote program origination equipment and therefore will not have the capability to originate live programs from the communities of Dillon, Silverthorne and Frisco (Tr. 1175–77).

### *Issues 8 and 9 - Areas and Populations and 307(b) Issues Involving Levin, Summit and Dillon*

### *Communities to be Served*

90. As already noted, the three communities for which Summit seeks tri-city licensing are Dillon, Frisco and Silverthorne. Levin and Dillon propose Dillon as their community of license. Summit has indicated that, in the event it is required to choose one community to specify as a community of license, it would select Silverthorne (Tr. 1158).

91. Dillon, Colorado, comprises 379 acres and has a permanent population according to the 1980 Census of 337. The permanent population has increased 85.2% since 1970. The town has issued 178 retail licenses. There are four churches in Dillon. The city government has a mayor and six trustees all of whom are elected. The town employs four administrative employees and five employees in the Public Works Department. There is a police chief, three full-time patrolmen and two reserves. The Dillon Fire Department is run by a salaried chief with 15 volunteer firemen. Dillon has its own Water and Sewage Department and operates a sewage treatment plant jointly with Silverthorne. There are no schools within the town, but there is an elementary school located in an adjacent unincorporated area. The Summit County Clinic and Hospital Bed Facility is located in Dillon. It has one full-time doctor (Summit Ex. 8, pp. 2–5).

92. Silverthorne has an area of about 1850 acres and a 1980 population of 989 permanent residents. The permanent population has increased 147.3% since 1970. Silverthorne has issued 155 business licenses. There are three churches in town. Silverthorne is

---

[38] These notices will also be interspersed throughout the broadcast day. Summit will also carry announcements to assist the public in recovery of lost property, pets and obtaining transportation (Tr. 1168).

governed by elected officials including a mayor and six trustees. There are six administrative employees, three employees in the Public Works Department, and 5 police officers including a marshall and a sergeant. There is also a salaried fire chief. One of the four elementary schools located in Summit County is in Silverthorne (Summit Ex. 8, pp. 7, 8, 10, 17).

93. Frisco has an area of about 390 acres and a 1980 population of 1,221 permanent residents, an increase of 159.2% over a 1970 population of 471. Frisco has issued 145 business licenses. There are two churches in town. Frisco has its own town government with seven elected officials, comprised of a mayor and six town board members. There are also five city administrative employees. The town government provides a Police Department headed by a Police Chief and six patrolmen. The Frisco Fire Department is run by a salaried chief and approximately 22 voluntary firemen. Frisco has its own water and sewage plants. One of the four elementary schools in Summit County is located in Frisco and the only high school and junior high school in Summit County are located on foreign service land adjacent to the town of Frisco. A number of government and county agencies are located in Frisco including the Job Service of Colorado, a state employment agency serving Summit County, and the County Extension Service (Summit Ex. 8, pp. 11–14, 17).

### *Proposed Facilities*

94. Levin, Summit and Dillon all propose to operate daytime only on a frequency of 1130 kHz. Levin and Dillon proposes nondirectional operation with a power of 5 kW. Summit proposes directional operation with a power of 10 kW, except during critical hours,[39] when the power will be reduced to 5 kW (Jt. Ex. 1, p. 1).

### *Comparison of Coverage*

95. In addition to serving an area in common, Summit and Dillon would provide service to underserved[40] areas that would not be served by Levin. Levin would not serve any underserved area not served by one or both of the other applicants. The number of presently available services within the uncommon underserved area, in square miles and the populations therein, are tabulated below (Jt. Ex. 1, pp. 2, 3, 4, 7, 8, Figs. 1, 2):

---

[39] The term "critical hours" means the two hour period immediately following local sunrise and the two hour period immediately preceding local sunset (Section 73.13 of the Commission's Rules).

[40] Areas proposed to be provided with fewer than five services.

| *Applicant* | *Two Services* *Area* | *Two Services* *Pop.* | *Three Services* *Area* | *Three Services* *Pop.* | *Four Services* *Area* | *Four Services* *Pop.* |
|---|---|---|---|---|---|---|
| Summit | 51 | 108 | 160 | 686 | 166 | 646 |
| Dillon | 0 | 0 | 23 | 41 | 60 | 130 |

There are no aural broadcast facilities licensed to either Dillon, Frisco or Silverthorne, and each community receives at least five existing aural broadcast services. The proposed 0.5 mV/m daytime contours of Summit, Levin and Dillon are substantially identical, and all three applicants will provide principal city coverage (25 mV/m signal strength) over Dillon, Frisco, and Silverthorne (Jt. Ex. 1, Figs. 1, 2).

### *Issue 10 - Contingent Comparative Issue (Levin, Summit and Dillon)*

### *Levin*

96. Alan K. Levin, an individual applicant, has no ownership interests in mass communications media (Levin Ex. 3), Levin will serve as the proposed station's full-time general manager. Levin resides in Denver, Colorado and proposes to commute to Dillon. Levin also plans to stay over in Dillon from time to time (Tr. 685–86). Denver is approximately 74 miles distant from Dillon and the drive time (one way) is approximately 1 ½ hours during inclement weather (Levin Ex. 2; Tr. 684–87). Levin plans to spend at least 40 hours at the station (5 days a week) excluding drive time (Tr. 686). Levin also plans to spend six hours per week on his personal real estate and business investments and activities (Tr. 683–84, 687). Levin presently spends ten to fifteen hours per week consulting for Photo-Tech, a photograph retail outlet but will cease his arrangement with Photo-Tech if his Dillon application is granted (Tr. 681–82). Levin has no past broadcast experience and is not a member of any civic organizations in Dillon or the surrounding service area (Tr. 684).[40a]

### *Summit*

97. John G. Gayer and Karl F. Crass each have a 50% ownership interest in Summit, a Colorado corporation. Gayer is President and a director; Crass is Vice President, Treasurer and director; and Carol B. Gayer, Gayer's wife is Secretary and a director (Summit Ex. 4). Crass has no media ownership interests (Summit Ex. 6, p. 5). Gayer is President, Director and 43.75% stockholder of Big Country Radio, Inc., former licensee of AM broadcast station KBCR and KBCR-FM, Steamboat Springs Colorado (located approximately 76 miles northwest of Dillon, Colorado). Stations KBCR and KBCR-FM were sold in June 1981 (Summit Ex. 5, p. 3).

---

[40a] Levin proposes to install an auxiliary power system (Levin Ex. 2A). Dillon and Summit do not propose to install auxiliary power generation equipment.

98. Crass is proposed as full-time general manager of the station (Summit Ex. 6, p. 5; Summit Ex. 4). Crass has over eight years past broadcast experience. While a student at Western State College, Gunnison, Colorado, Crass served as program director and station manager of non-commercial, educational FM broadcast station KWSB-FM, which is licensed to Western State College. From 1974 to June 1981, Crass was an employee at stations KBCR and KBCR-FM, Steamboat Springs, Colorado, with responsibilities in the areas of announcing, selling, and engineering. At the time KBCR and KBCR-FM were sold in June 1981, Crass was station manager of the stations and continued to serve as station manager under the new owners until April 1982. From April 1982 until the present, Crass has been Vice President and general manager of KHTX Radio, Carnelian Bay, California (Summit Ex. 6, pp. 2–4; Order (FCC 82M-1934), released June 18, 1982). Summit has not shown that Crass is a member of any civic organizations in Dillon-Frisco-Silverthorne or the surrounding service area. If Summit's application is granted, Crass will move to the Dillon-Frisco-Silverthorne area (Summit Ex. 6, p. 5).

99. Gayer proposes to devote 21 hours a week to the station's operation. He will assist Crass in the management of the station, and will participate in sales, programming and engineering (Summit Ex. 5, p. 4). Gayer has had prior broadcast experience. From 1974 to 1981, Gayer was vice president and general manager of Station KBCR-FM. He was general manager of KRCR-AM from 1976-1981 (Summit Ex. 5, p. 3). As general manager of the FM and FM stations, Gayer had ultimate supervisory responsibility for all employees and for the management and operation of the stations (Summit Ex. 5, p. 4). Summit has not shown that Gayer is a member of any civic organization in Dillon-Frisco-Silverthorne or the surrounding service area. If Summit is awarded the permit, Gayer will move from his current residence in Steamboat Springs to Summit County (Summit Ex. 5, p. 4).

### *Dillon*

100. Robin G. Theobald is President, Director, and 100 percent owner of Dillon and will be the full-time general manager of the proposed station. Theobald has committed himself to work at least fourty hours a week (8 hours a day, 5 days a week) at the station (Dillon Ex. 1, p. 1; Tr. 2639). Dillon and its principals do not have any ownership in mass communications media (Dillon Ex. 1, p. 1). Theobald, who is 31 years of age, has approximately 4 years past broadcast experience; from September 1975 until June 1, 1979, he was the general manager of FM broadcast station KLGT, Breckenridge, Colorado (Dillon Ex. 2, pp. 1–3).

101. Theobald lives in the service area of the proposed Dillon station (Tr. 2641). From 1973 until 1979, Theobald lived in Brecken-

ridge, Colorado, which is located about 15 miles south of Dillon; from 1980 until the present Theobald has resided with his wife and one-year old son in Blue River, Colorado, which is located approximately 18 miles south of Dillon. Theobald is active in many local community organizations. Since 1978 Theobald has been a member and officer of the Red, White, and Blue Volunteer Fire Department, which serves the entire south end of Summit County and responds on mutual aid to Dillon; he is currently Captain of the South Station of the Red, White, and Blue Fire Department (Dillon Ex. 2, p. 3; Tr. 2631–32).[41] Theobald is also Vice President (and past President and member of the Board of Directors) of the Summit County Rotary Club, which held its meetings in the Chamber of Commerce Building in Firsco; for the past three years. He has also been chairman of the Rotary Club fund-raising drive which benefits worthy causes in Summit County. Theobald has also been chairman for the past three years of the Summit County blood drive, which is held in Dillon (Dillon Ex. 2, pp. 3–4; Tr. 2633–37). Theobald is a member of the Summit County Elks Lodge, located in Silverthorne, and the Summit County Lions Club, which holds its meetings at various restaurants in Summit County (Dillon Ex. 2, p. 4; Tr. 2637–38, 2641). Since 1978, Theobald has been a member of the Board of Directors of the Backstage Theater, a local theater group, in Breckenridge, Colorado (Dillon Ex. 2, p. 4; Tr. 2638–39).

102. Theobald is involved in a number of business ventures, none of which precludes his carrying out his commitment to work full-time at the station. Theobald is the owner of the Chinese Laundry, an antique store located approximately six miles north of Breckenridge, which is open seven days a week during the ski season (Tr. 2617, 2619). From the time the Chinese Laundry was opened, Theobald has been responsible for the day-to-day operation of the retail business (Dillon Ex. 1, Tr. 2618). Most recently, Theobald has been assisted by his wife and if Dillon receives the permit, Theobald would turn over the business to his wife to the extent necessary to fulfill his commitment to the proposed station (Tr. 2620). Theobald, under those circumstances, would devote a maximum of 10 hours a week to the Chinese Laundry (Tr. 2643). Theobald also owns one share of stock, is vice president and director in Theobald and Company, a real estate brokerage in Breckenridge, Colorado. The company owns approximately eight single family residences and commercial space within the city limits of Breckenridge (Tr. 2624–26). Theobald's duties consist of occasionally showing the real estate owned by the company to a prospective purchaser and overseeing the maintenance of rental property (single family residences) owned by

---

[41] As Captain, Theobald is on call approximately two nights every six weeks to answer calls. As member, Theobald only has to respond when he is available (Tr. 2633).

the company (Tr. 2625). Theobald spends about fifty hours a month in connection with the company (Tr. 2627). If the construction permit is granted, Theobald would devote less than ten hours a week to the company (Tr. 2643–44). Theobald also is currently engaged in the management of real estate investments in the Summit County area. The real estate includes undeveloped property in the Blue River area that Theobald hopes to develop as residential property sometime in the future. In addition, Theobald owns ten acres in the vicinity of his antique store which he is attempting to develop as retail commercial space. Theobald has taken preliminary steps to develop the latter property such as discussions with Planning Department and the Sanitation District (Tr. 2620–21). Over the last year, Theobald has devoted a maximum of ten hours a month to the development of the Farmers Corner property (Tr. 2622). Theobald also spent about 40 hours a month selling lots from an eight acre residential subdivision developed on his Blue River properties. All the saleable lots have been sold (Tr. 2623). Theobald, in the past, has been involved in numerous mining ventures. He is currently not engaged in those ventures (Dillon Ex. 2, p. 2; Tr. 2627). Theobald owns at present mining machinery and property described as mining property. Theobald has retained the mining machinery for the purpose of mining the property in which he holds an ownership interest or other property which he does not own and on which he holds a lease (Tr. 2628–29). Theobald has spent 3–4 hours a month in connection with his ownership of mining property and equipment and estimates he will spend approximately the same amount of time in the future (Tr. 2630). Theobald and his partner, Arlo Cox have had discussions with an individual who has put together a "proposal to obtain a large capital investment to begin a larger class of mining operation" (Tr. 2629). Theobald has not decided when or even whether to proceed with this venture (Tr. 269). Moreover, he has not decided how active he would be in the venture even if a decision was made to go forward (Tr. 2630).[42]

### *Issues 19 and 20 - Areas and Populations and 307(b) Issues Involving Grand and Jefferson*

### *Communities to be Served*

103. Grand proposes to serve Fraser, Colorado, Fraser has a population of 470 based on the 1980 U.S. Census and is located in Grand County, which, based on 1980 U.S. Census data, has a population of 7,475. It has no aural transmission service (Grand Ex. 7, pp. 2, 11, and 45). Jefferson proposes to serve Golden, Colorado. Golden has a population of 12,237 based on the 1980 U.S. Census. It

---

[42] Theobald estimated, depending on his involvement, his time devoted to the venture could range from 40 hours a week to maybe two hours a week (Tr. 2630).

has no aural transmission service (Grand Ex. 7, p. 2; Jefferson Ex. 4, p. 1).

104. Fraser is located in the upper Fraser Valley of Grand County. It is located in an isolated area whose economy is based on recreational activities, mainly skiing. Police and fire protection are provided by Grand County Sheriff's Department and the East Grand Fire Protection District No. 4. There is one elementary school located in Fraser. The older students travel to Granby, located approximately 15 miles from Fraser (Grand Ex. 7; Tr. 2506). There are no doctors located in Fraser and medical patients must go to either the Timber Line Medical Center or the Kremmling Medical and Surgical Association in Winter Park (Grand Ex. 7, p. 4). The nearest hospital is located 45 miles away in Kremmling, Colorado (Tr. 2503). The only industry located in Fraser other than skiing and tourism is a lumber mill (Tr. 2511). Fraser is a member of an area Chamber of Commerce group located in Winter Park (Grand Ex. 7, p. 1).

105. Golden, Colorado, is the county seat of Jefferson County which had a 1980 population of 371,741 persons (Jefferson Ex. 4; Tr. 3247). It is located in the Denver SMSA (Grand Ex. 7, p. 17). Golden has a council-mayor form of government and has its own fire, police departments and a medical clinic. There are five financial institutions in Golden and Golden has a local newspaper, The Colorado Transcript, which is published twice a week (Jefferson Ex. 4). The population of Golden increased 24.65 percent since 1970. There are five elementary schools, three junior high schools and two high schools located in Golden. In addition, there are two colleges. The five largest industries in Golden and the number of persons employed are: Coors (8,609 employees); Martin Marietta (5,000 employees); Rockwell, Inc. (3,509 employees); John Manville (2,000 employees); and Cobe Labs (1,600 employees). Approximately ten churches are located in Golden (Jefferson Ex. 4).

*Proposed Facilities*

106. Grand and Jefferson propose to operate directionally on a frequency of 1250 kHz day and night. Grand proposes to operate with a daytime power of 500 W and a nighttime power of 5 kW. Jefferson proposes to operate with a daytime power of 500 W and a nighttime power of 2.5 kW (Jt. Ex. 1, p. 1).

*Comparison of Coverage*

107. In addition to serving areas in common at night, Grand would provide service to underserved areas that would not be served by Jefferson. The number of presently available services to the areas and populations served exclusively by Grand are: 69 square miles

and 626 persons presently receiving one service (Jt. Ex. 1, pp. 5, 6, 7, 8, Figs. 3, 4; Grand Rebuttal Ex. 1).[42a]

108. In establishing the number of presently available services to the underserved areas, the following Colorado stations were considered (Jt. Ex. 1, pp. 6, 8, Figs, 2, 4; Grand Rebuttal Ex. 1):

| *Call* | *Location* | *Facilities* |
|---|---|---|
| KSNO | Aspen | 1250 kHz, 5kW, D |
| NEW (CP) | Colorado Springs | 1190 kHz, 50kW, D |
| KRAI | Craig | 550 kHz, 5kWTD |
| KLZ | Denver | 560 kHz, 5kW, DA-1, U |
| KHOW | Denver | 630 kHz, 5 kW, DA-N,U |
| KERE | Denver | 710 kHz, 5kW, DS-1, U |
| KOA | Denver | 850 kHz, 50 kW, ND, U |
| KRKS | Denver | 990 kHz, ND, D |
| KLDR | Denver | 1090 kHz, 50,KW, DA-D |
| KHOW | Denver | Ch. 239 mHz, 100 kW, 750 feet |
| KOSI | Denver | Ch. 266 mHz, 100 kW, 790 feet |
| KBPI | Denver | Ch. 290 mHz, 99 kW, 890 feet |
| KAZY | Denver | Ch. 294 mHz, 94 kW, 960 |
| KIIX | Fort Collins | 600 kHz, 5kW, DA-D |
| KHEE | Hayden | 1000 kHz, 10 kW, ND-D |
| KLRR | Leadville | 1230 kHz, 1kW, 250W-LS, U |
| KLMO | Longmont | 1060 kHz, 10 kW, MD-D |
| KBCR | Steamboat Springs | 1230 kHz, 1kW, 250W-LS-U |
| KVMT | Vail | Ch. 284 mHz, 76kW, 1200 feet |

### *Issue 21 - Contingent Comparative Issue (Grand and Jefferson)*

### *Grand*

109. Grand Radio, Inc., a Colorado corporation, has two shareholders, Dwight H. Gayer and Diane E. Gayer, who each own a 50% interest in the corporation. Dwight H. Gayer is President, Treasurer and Director of the corporation; Diane E. Gayer is Vice President, Secretary and Director of the corporation (Grand Ex. 4). Neither Dwight or Diane Gayer have media ownership interests.[43]

110. Dwight H. Gayer will serve as General Manager and Chief Engineer for Grand Radio, Inc.'s proposed station and will be involved in virtually every aspect of the station's operation. Gayer will work full-time in this position (Grand Ex. 5, p. 6). Dwight Gayer has prior broadcast experience. During the summer of 1975, Dwight Gayer was employed at Shenandoah Broadcasting Company as a full-time account executive for Radio Station KFNF, Shenandoah, Iowa (Grand Ex. 5, pp. 1–2). At Mesa College, Grand Junction,

---

[42a] Fraser presently recieves three primary aural daytime services and one primary aural nighttime service. Golden receives a minimum of five primary aural daytime services and a minimum of three nighttime aural services (Jt. Eng. Ex. 1. p. 2).

[43] Dwight Gayer is 100% owner of Grand Communications, Inc., applicant for an FM broadcast station at Kremmling, Colorado.

Colorado, beginning in the full of 1975 and for a period of two years, Gayer was an announcer and news director for KMSA, a non-commercial educational station in Grand Junction, Colorado (Tr. 2455). He also performed duties as part-time production manager and assistant manager for public relations (Grand Ex. 5, pp. 2–3). In 1976 Gayer, in addition to his work with KMSA, was also employed as duty engineer by XYS, Inc., licensee of KREX-AM, FM and TV in Grand Junction, Colorado (Tr. 2457). He also acted as a part-time news reporter for XYS, Inc. For about 6 months in 1977, Gayer worked as a full-time announcer for KVMT, Vail, Colorado. In the fall of 1977 he moved to Fraser, Colorado. From April 1978 to November 1978 Gayer left Fraser to work as an announcer, news reporter, account executive and engineer at KBCR-AM and FM, Steamboat Springs, Colorado (Tr. 2460–61). He returned to Fraser in November 1978 (Tr. 2463; Grand Ex. 4, pp. 3–4). From April 1979 to September 1980, Gayer worked at KVMT, Vail, Colorado as Assistant Manager and later as Chief Engineer, when the station was sold to Vail Mountain Broadcasters in September 1974 ((Tr. 2464–69). Gayer then moved to Granby, Colorado. He moved back to Fraser, Colorado in September 1981 and now resides in Fraser. Gayer is a member of the Winter Park Chamber of Commerce and the Winter Park Handicapped Association (Grand Ex. 5, p. 6).

111. Diane E. Gayer has proposed part time (21 hours) involvement at the station directing planning and administration of the station (Grand Ex. 6; Tr. 2250–51). She presently resides in Denver with her husband and has no plans to relocate to Fraser but rather will commute to and from Fraser to fulfill her commitments to Grand (Tr. 2263). She is employed by the architectural firm of Duff, Reck and Lehman, P.C. and is also the President of Artemis Design, a company which she and her husband founded in 1979 (Grand Ex. 6). Diane Gayer has limited broadcast experience. In 1974, she worked at KAAT, Denver, Colorado where she was receptionist and in charge of daily logs (Grand Ex. 6). In 1975 she moved to Steamboat Springs and was employed by KBCR where she developed programs, wrote advertising and performed and public relations duties (Grand Ex. 6; Tr. 2172). She has not been employed in the broadcast field since 1976 (Grand Ex. 6).

112. Diane Gayer is proposed to spend 21 hours a week as the station's part time Director of Administration and Planning. When asked what general duties of the Director of Administration and Planning would be she stated she would perform:

> "General administration, take care of any problems that arise on a day to day basis that Dwight would be having problems with, making sure we meet our financial commitments, working with the community needs as far as programming. . .." (Tr. 2251).

Ms. Gayer was unable to articulate the amount of time she would spend in these various duties (Tr. 2251). Ms. Gayer may do the station's billing in the beginning but not in the long run (Tr. 2252) and would review the station's financial statement "to make sure that things are working out" (Tr. 2254). Ms. Gayer will not be involved in sales (Tr. 2255), the news department (Tr. 2255) or in public affairs programming (Tr. 2256). Ms. Gayer is presently employed full-time (Monday to Friday, 8 a.m. to 5 p.m.) by the architectural firm in Denver and intends to continue her career in architecture and work the same hours at the firm upon a grant of the Grand application (Tr. 2259, 2263). She testified that the 21 hours per week she proposed to spend at the station would be one or two days each weekend and five hours a week at home (Tr. 2261–62).[44] She would be required to commute between Fraser and Denver on the weekends to perform her station duties, a trip which she estimated would take her between two and one-half and three hours (Tr. 2260–62).

### *Jefferson*

113. The ownership of Jefferson Wireless Company is as follows:

| | |
|---|---|
| Eric H. Johnson | 16⅔% |
| Brent W. Lambert | 16⅔% |
| Gary Crowder | 16⅔% |
| Estate of Henry Broughall | 50% |

(Jefferson Ex. 1). None of the officers, directors or shareholders of Jefferson are proposed to be integrated into the day-to-day management of Jefferson's proposed station (Jefferson Ex. 2). Eric H. Johnson, Brent W. Lambert and Gary W. Crowder, partners in Jefferson, are all general partners in Listeners' Network, which is licensee of Radio Station KIOQ-FM, Bishop, California, licensee of Radio Station KEVA-AM, Evanston, Wyoming, and permittee of a new FM radio station at Evanston, Wyoming (Jefferson Ex. 3). Eric H. Johnson and Brent W. Lambert are also shareholders, directors, and officers in Northeast Kingdom Broadcasting, Inc., which is the licensee of station WIKE-AM, Newport, Vermont, station WSTJ-AM, St. Johnsburg, Vermont, and station WOLF, Syracuse, New York (Jefferson Ex. 1. Ex. 3).

## *CONCLUSIONS*

### *Multiple Ownership Issue*

114. Issue 1, as designated by the Commission, called for a determination whether grant of the application of Summit, Eagle or Grand or any combination thereof, would violate Section 73.35(a) of

---

[44] Ms. Gayer testified that she sometimes has to work at the firm on weekends, which she estimated was less than ten times (Tr. 2260).

the Commission's Rules with respect to multiple ownership or control of broadcast stations or Section 73.35(b) of the Commission's Rules with respect to regional concentration of control. At the time of designation (December 1, 1980) members of the Gayer family held interests in each of the above applications and in KBCR-AM-FM, Steamboat Springs, Colorado. In adding the multiple ownership issue, the Commission observed that its "analysis of present and past Gayer family interests gives rise to sufficient questions of common control to warrant further exploration." The Commission further noted: "The history of the Gayer interests and the striking parallels among supposedly independent stations and proposals suggest at least an informal family business operation revolving around the senior Gayers" (*Designation Order*, Paragraph 11). Subsequent to the commencement of this proceeding, the Gayer family interests under scruting have markedly changed. The Eagle application has been dismissed and Radio Stations KBCR-AM and FM have been sold.[45] The remaining pertinent Gayer interests for consideration under the multiple ownership issue are the Summit and Grand applications and the applications filed by John G. Gayer and Dwight H. Gayer for FM stations in Fruita and Kremmling, Colorado, respectively.

115. As noted, issue 1 concerns a violation of Section 73.35(a) and 73.35(b). Summit and Grand contend that the regional concentration of control rule, 47 C.F.R. 73.35(b) only applies in situations where the acquisition of a station would result in the common ownership of three broadcast stations where any two are within 100 miles of the third and if there is primary service contour overlap of any of the stations. They point out correctly that John G. Gayer and Dwight Gayer have interests in only two stations (Grand and Kremmling or Summit and Fruita) and that Fruita is located over 100 miles from Kremmling as well as Grand's and Summit's proposed cities of license. This contention is rejected. The *First Report and Order*, 63 FCC 2d 824 (1977), cited by Summit and Grand, makes clear that, while, as a general rule, the Commission would not raise a concentration issue absent an ownership pattern such as discussed, *above*, it retains the power to do so where other factors raise the possibility that a grant of an application would create a concentration of control and be inconsistent with the public interest, 63 FCC 2d at 828, paragraph 16. Indeed, reading of the Designation Order here indicates the Commission had both situations in mind in designating a regional concentration of control issue (see *Designation Order*, paragraphs 2–11). In sum, the changes in the Gayer

---

[45] By Order released June 11, 1981 (FCC 81M-1801), issue 1 was modified to consider the effect of the application of High Country Television, Inc. for a new television station at Glenwood Springs, Colorado. John H. Gayer had an interest in High Country. However, subsequently, the Glenwood television proceeding was settled and no member of the Gayer family has an interest in the permittee for the Glenwood Spring facility.

interests did not moot the regional concentration of control issue. However, the findings establish that the application for Fruita is solely John G. Gayer's undertaking and is totally independent of any other Gayer family member. Similarly, Dwight H. Gayer will be solely responsible for the financing, programming and operation of the proposed Kremmling station and no other Gayer family member has any interest in the Kremmling application. The findings further establish, as discussed *below* under the Section 73.35(a) issue, that Summit and Grand are not under common control and that John H. Gayer will not control Summit or Grand. It is therefore concluded that the regional concentration of control issue is resolved in favor of Summit and Grand.

116. Section 73.35(a) of the Commission's Rules provides in pertinent part that:

> No license for an AM broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls: one or more standard broadcast stations and the grant of such license will result in any overlap of the predicted or measured 1 mV/m ground wave contours of the existing and proposed stations, computed in accordance with Section 73.183 or Section 73.186. . . .

Since a grant of both Summit and Grand would result in overlap of their 1 mV/m contours, it must be determined whether these applicants will be under common control.

117. There is no credible evidence upon which it can be concluded that Summit and Grand are under common ownership or control. In *United Community Enterprises, Inc.*, 37 FCC 2d 953 (Rev. Bd. 1972), the Review Board made clear that a finding of ownership, or control which is the equivalent of ownership, is necessary for the provisions of Section 73.35(a) to be invoked. *See, also, Badlands Broadcasting Co.*, 60 FCC 2d 353, 359 (Rev. Bd. 1976). In order to find that Summit and Grand are under common control, it would be necessary to show that Summit and Grand are a single entity or that both applicants are under the common ownership of John H. Gayer. John H. Gayer did provide limited assistance to his chilren who are principals in Summit and Grand. However, the assistance provided by Mr. Gayer was no more than can be considered normal in a family situation and cannot be equated with ownership, *Corvallis Broadcasting Corp.*, 38 FCC 2d 30 (Rev. Bd. 1972). It is understandable that the Gayer children would seek the assistance of their father, particularly where, as here, the father is an experienced broadcaster and qualified radio engineer. In *Medford Broadcasters, Inc.*, 34 FCC 2d 987 (1972), the Commission stated:

> Since [the father] is an experienced broadcaster and has been associated in various capacities with radio broadcasting for many years, it is certainly

> understandable that his son would come to him for advice and assistance in matters pertaining to station operations. *Id.* at 993.[45a]

118. A long series of common decisions has firmly established that a family/business relationship, standing alone, no matter how close, is *not :fo sufficient to create the presumption of common control for purposes of applying the Commission's multiple ownership rules. Southern Indiana Broadcaster*, 14 RR 117 (1956); *L&S Broadcasting Co.*, 9 BR 2d 423 (1967); *Farnell O'Quinn*, 11 FCC 2d 801, 12 RR 2d 422 (1968); *KTRB Broadcasting Co.*, 46 FCC 2d 605, 29 RR 2d 1578 (1976); *Badlands Broadcasting Co.*, 60 FCC 2d 353 (Rev. Bd. 1976). Even where a family business relationship exists, no finding of common control can be made where the broadcasting stations involved are separately controlled, separately supervised, financially independent and operated on a daily basis by separate staffs in separate markets.

119. The record in this proceeding demonstrates fewer indica of control than in any of the cited cases where no control was found. Here, there will be no common employees at the stations proposed by Summit and Grand. Summit and Grand propose independent programming. There is no evidence to conclude that the programming provided by Summit and Grand will be commonly controlled or will not contribute to the diversity of programming in their respective service areas. Summit and Grand have independent financing. Neither applicant relies on any financial contribution from John H. Gayer or from each other. The funds to be placed at risk by the principals are their own. The principals of Grand and Summit selected the respective communities they propose to serve independently of each other and independently of John H. Gayer. There has been no showing that John H. Gayer will be involved in a managerial, controlling or any other capacity in the operations of the stations proposed by Grand and Summit, or that any of the Summit and Grand principals will be involved in the management or operation of the other's station. Indeed, the record reflects just the opposite. Summit and Grand will be independently managed and operated. Under these circumstances, it is clear that Summit and Grand are independent of each other and John H. Gayer. While John H. Gayer did provide some assistance to his children, there is no evidence to support a conclusion that John H. Gayer will have a controlling interest tantamount to ownership in either Summit or Grand. Accordingly, Section 73.35(a) of the Commission's Rules does

---

[45a] In *Medford Broadcasters, Inc., supra*, the Commission found that a father was not an undisclosed owner of a station owned of record by his son where the record demonstrated that the father had financed the purchase and initial operation of the station, was present at the station more than the son, was consulted by the son prior to decisions on operation and management, fulfilled the major responsibilities of a licensee with the son merely offering his signature to documents, and claimed the income from the station. Seealso *Alabama Radio Corp.*, 69 FCC 2d 1256 (1978).

not bar the grant of the applications of both Summit and Grand. Issue 1 is resolved in favor of Summit and Grand.

### *Illegal Use of Narcotics*

120. This issue calls for a determination whether Dillon's principal, Theobald, used cocaine at Station KLGT-FM. Three witnesses, all admittedly disgruntled former employees, testified that they saw Theobald use cocaine at the radio station. Theobald has categorically denied that the incidents of cocaine use alleged by Atkinson, Lindblad and Ross ever occurred. For the following reasons, it is concluded that the testimony of these witnesses is unreliable and can not be credited. On the other hand, Theobald's testimony is credible and is accepted.

121. Atkinson claims that she observed Theobald inhale cocaine from a vial on two occasions in 1978. Atkinson further asserts that on each of these occasions Theobald offered the cocaine to her and she inhaled from the vial. However, Atkinson's testimony about these events raises substantial doubt that the vial contained cocaine. Atkinson concedes that at the time these alleged events occurred, she was busy operating the control board of Station KLGT. Further, she did not see Theobald take the cap off the top of the vial or any substance move from the bottle portion to the cap portion. Also, Theobald did not tell her the substance was cocaine. Although she claims that Theobald led her to believe that the substance she was inhaling contained cocaine, she cannot recall what Theobald said or any response she may have made at the time. Atkinson also bases her belief that the vial contained cocaine on her observation of other persons using cocaine and her claimed prior use. However, she was unable to state how often she observed other persons she believed were using cocaine or provide even an approximation of how often she had used cocaine herself. In this connection, Atkinson had never used a device in the shape of a "bullet." Atkinson also assumed the substance was cocaine based upon Theobald's "attitude" and the fact he was "more energetic" after inhaling the substance. However, Atkinson conceded that a person who drank large quantities of coffee would also act more energetic. Coffee was available at the station and Atkinson was sure Theobald had consumed coffee. Atkinson drank coffee "like crazy." It is also reasonable that Atkinson would have also become "more energetic" if she had inhaled cocaine. Significantly, Atkinson did not assert that inhaling the substance affected her. Atkinson's conflicting and inconsistent description of the "bullett" device raises further doubts about the reliability of her assertions. Thus, Atkinson's hearing room identification of a "bullet" device (used to inhale cocaine) as being "like the one" Theobald had in his possession conflicts with a physical description of the device which she provided in a sworn affidavit of June 30, 1981. The device shown by Levin's counsel to Atkinson contained a stop-cock

on the side; the illustration made by Atkinson in her 1981 affidavit did not include a stop-cock on the vial. Also at her September 20, 1981 deposition, Atkinson described the top of the vial "as like the top of a Vicks inhaler." Moreover, the physical shape and proportion of cap to base of a Benzedrex inhaler is similar to the vial device which Atkinson depicted in her 1981 affidavit. Atkinson also gave conflicting testimony concerning the contents of the vial. Atkinson initially testified that the vial used by Theobald contained "white powder." She subsequently changed her testimony from "white powder" to "light colored powder" and ultimately conceded, under cross examination, that it could have been yellow instead of white and it would not have looked any different in the bottle. Also, Atkinson initially testified, when shown two vials by Levin's counsel, that one vial contained "white powder" while the other device had a "clear liquid" in it. However, on cross examination, Atkinson, admitted that she could not tell by looking at the vials that one contained a white powder or that the liquid was clear-colored. Atkinson's testimony is uncorroborated by any witness. Further, Atkinson has stated her dislike of Theobald and his parents and her desire that Theobald not get another broadcast license. Her admitted hostility buttresses the conclusion that Atkinson's claim that Theobald inhaled cocaine can not be credited.

122. Lindblad's allegations that Theobald used cocaine on two occasions, first in August 1978 and then some time during the period November 1978 through January 1979, is also unreliable and can not be credited. Lindblad's hearing room identification of the "bullet" device as being "like" or "similar" to that device which Theobald is alleged to have used in August 1978 is not only ambiguous and uncertain, but also conflicts with a description of the device which she gave under oath in a deposition prior to testifying in this proceeding. Lindblad could provide no substantive proof that Theobald inhaled cocaine in the control room of KLGT or that he inhaled and offered cocaine to her while in his car; indeed, in each instance, Lindblad inferred that Theobald was using cocaine based upon either his actions or implications from different words he is alleged to have used but which she could not recall. Once again, there were no witnesses who could corroborate Lindblad's allegations. Moreover, Lindblad's testimony demonstrates hostility and bias towards Theobald because of his alleged mistreatment of her while she was an employee of Station KLGT.

123. Ross' allegation that Theobald inhaled cocaine during the course of a causal conversation which took place in Theobald's office at Station KLGT shortly after Ross either quit or was terminated for cause would appear, under the circumstances, to be inherently improbable. The employer-employee relationship between Theobald and Ross was, almost from the start, tense and acrimonious, and eventually culminated in her dismissal. Theobald denies that he ever

talked to Ross after her dismissal, and, under the circumstances of her dismissal, it is improbable that they would subsequently engage in a social conversation in Theobald's office at KLGT. It is even more improbable that Theobald would compromise himself by inhaling cocaine in Ross' presence or in such a conspicuous place as his office, which was open not only to the public reception area of Station KLGT but also could be viewed by pedestrians outside his office window. Furthermore, Ross' testimony is also uncorroborated by any other witness and demonstrates a deep hostility and bias towards Theobald. Indeed, Ross conceded that her motivation in testifying against Theobald was to "permanently remove Robin Theobald from the field of radio."

124. Theobald denied using cocaine at the radio station.[46] His testimony has been candid, consistent and entirely credible and is accepted. Moreover, Theobald presented evidence, corroborated by Dr. Sophocles, that during the period the alleged uses of cocaine occurred, he had a dependency on nasal decongestants and, specifically, used a benzedrex inhaler. The similarity in appearance between the benzedrex inhaler and the "bullet" device used for inhaling cocaine raise the distinct possibility that the nasal spray may have been mistaken for a vial containing cocaine. It is also likely that the hostility toward Theobald may have colored the perception of Atkinson, Lindblad and Ross. In any event, Levin, who has the burdens of proceeding and proof on this issue, has not satisfied the preponderance of the evidence standard. Issue 25 is resolved in favor of Dillon.

### *Sexual Harassment*

125. This issue calls for a determination whether Theobald harassed and/or discriminated against KLGT-FM employees on the basis of sex. Retaliatory actions of a male supervisor taken because a female employee declined his sexual advances can constitute sex discrimination in violation of Title VII of the *Civil Rights Act of 1964*, 42 U.S.C. Section 2000(e). *Barnes* v. *Costle*, 561 F.2d 983 (D.C. Cir. 1977). However, the record in this case does not sustain such a conclusion. First, the record establishes that there was only one sexual advance. It was unaccompanied by any threat or suggestion that Lindblad's accession or rejection would have an impact on her employment. In addition, the record does not show any objective evidence of retaliatory behavior on the part of Theobald as a result of Lindblad's rejection. While Lindblad may have perceived a change in Theobald's behavior towards her, the record demonstrates that both

---

[46] The fact that Theobald admitted using cocaine on one occasion in 1975 or 1976 at a private home does not warrant any adverse conclusions. It was an isolated instance which was unrelated to his operation of a broadcast station and remote in time. See *Uniform Policy as to Violation by Applicants of Laws of United States*, 42 FCC 2d 399 (1951).

before and after the one sexual advance, Theobald's behavior was consistent, if only consistently somewhat erratic. Thus, he shouted at Lindblad both before the incident and after it. Consequently, the record fails to show any retaliatory action on the part of Theobald nor even a threat of such action.

126. The record in this case therefore stands in contrast to other cases where similar complaints have been found to be actionable. *Barnes* v. *Costle*, *supra*, involved: repeated solicitation by the employer to the employee to join in social activities after office hours; repeated remarks which were sexual in nature; and repeated suggestions that cooperation in a sexual affair would enhance the employee's employment status. The plaintiff in *Barnes* v. *Costle* alleged that her rejection of her employer's advances resulted in her job being abolished. 561 F.2d at 985. In *Tomkins* v. *Public Ser. Elec. & Gas Co.*, 568 F.2d 1044 (Third Cir. 1977), the plaintiff alleged that her supervisor made sexual advances and demands and conditioned her job status on a favorable response to those demands and advances. While in *Tomkins* only one incident of a sexual advance occurred, it was accompanied by threats of recrimination against the employee in her employment, threats of physical force, and, ultimately, physical restraint of the employee. 568 F.2d at 1045. These cases are, therefore, clearly distinguishable from the instant one. Accordingly, the sexual harassment issue (issue 26) is resolved in Dillon's favor.

### *False Affidavit/False Testimony Issue Against Summit*

127. The issue centers on the use of the phrase "a matter of convenience" in the December 1978 affidavits filed by John G. Gayer and Crass and John H. Gayer's role[47] in the preparation of a proposed merger Agreement tendered to Levin. The findings establish that John G. Gayer and Crass did not misrepresent facts in their December 1978 affidavits to the Commission in describing why John H. Gayer originally contacted Levin on their behalf. As the testimony shows Crass and John G. Gayer selected the phrase "matter of convenience" to indicate their feeling that it was easier for them if John H. Gayer placed the call to Levin. It was easier, they felt, because John H. Gayer and Levin both lived in Denver and because Crass and John G. Gayer were apprehensive about what might come up in the initial call. While the term "convenience" may have been imprecise, it was not inaccurate. More important, Omaha and Levin have not shown that the use of the term or the failure to

---

[47] Although Eagle's application has been dismissed, John H. Gayer's qualifications remain an issue in the Omaha, Nebraska proceeding (BC Docket No. 80–691 et al). Gayer owns 32.5% of the stock of Family Television, Inc., an applicant in the Omaha proceeding, and an issue has been designated there which requires a determination of the effect of the resolution of the issues specified in *Alan K. Levin*, FCC 82M-0860, released March 17, 1982 upon the basic and/or comparative qualifications of Family.

mention their apprehension in the 1978 affidavits was intended to deceive the Commission. Rather, John G. Gayer and Crass simply did not attach much significance to each element of their feeling. Their primary concern was to rebut Levin's argument that since John H. Gayer contacted Levin first John H. Gayer was the real party in interest. The point being made was that John G. Gayer and Crass requested John H. Gayer to make the call on their behalf and that, contrary to Levin's contention, John H. Gayer was not acting on his own as a real party in interest in Summit. No evidence has been adduced suggesting that the 1978 affidavits falsely portrayed John H. Gayer's status in Summit.

128. It is also concluded that John G. Gayer, John H. Gayer and Crass neither misrepresented facts nor lacked candor by failing to mention, in the December 1978 affidavits, John H. Gayer's role in preparing the proposed merger agreement. Summit's principals have testified that John H. Gayer's participation was insubstantial and did not warrant any mention. Their explanation is reasonable and is fully supported by the record. The findings establish that the basic elements of the proposal were agreed upon by John G. Gayer and Crass before they arrived at KAAT's offices, that John H. Gayer was present and gave them some general advice as to how to approach Levin and some suggestions as to the agreement, that John H. Gayer was in and out of the room and on the phone much of the time while John G. Gayer and Crass worked on the proposal, and that John H. Gayer was so pressed with the business at KAAT that he spent no more than ten minutes with them. There is no support for Levin's and Omaha's contentions that John H. Gayer's role was substantial or that the omission of a description of John H. Gayer's activities was motivated by a desire to conceal John H. Gayer's control and ownership interest in Summit. This purported motive does not withstand analysis. As pointed out by Summit, if concealment was their intention, John H. Gayer never would have called Levin or met with him. Having done so, it does not make sense that John H. Gayer, John G. Gayer and Crass would seek to conceal ten minutes of advice concerning the merger proposal. In sum, the record supports the conclusion that John H. Gayer's participation in the merger proposal was limited and insubstantial and the failure to mention his involvement was not motivated by a desire to conceal John H. Gayer's control of Summit. Issue 27 is resolved in favor of Summit and John H. Gayer.

### *Misrepresentation Issue Involving Grand and Summit*

129. The crux of this issue is whether John H., John G. and Dwight Gayer intended to deceive the Commission when they furnished information concerning intra-family transfers of stock in Big Country Radio, Inc. Intent to deceive is the *sine qua non* of a finding of misrepresentation or lack of candor. *Kaye-Smith Enter-*

*prises*, 71 FCC 2d 1402, 1415 (1971); *CBS, Inc.*, 49 FCC 2d 1214, 1223 (1974); *Fox River Broadcasting, Inc.*, 53 RR 2d 44, 46 (1983).[48] Although the Gayers may have erred in providing some of the information, there is no basis for concluding there was intentional deception. The key to understanding John H. Gayer's treatment of the intra-family transfers is the Big Country ownership report filed in August 1976. This report was filed approximately two years before the filing of the applications involved in this proceeding. The 1976 filing reflected a reorganization of Big Country as a result of a merger between Big Country and a competing applicant. As part of the reorganization Dwight and Diane Gayer each gave 500 shares to their brother, John, and to their mother, Dorothy. In both instances, John H. Gayer reported the transaction as having been based on the original amount paid for the stock at the time of issuance, *i.e.*, the $1.00 per share par value. John H. Gayer testified repeatedly that in his mind that was the appropriate way to treat intra-family transfers since no new consideration was given. Omaha misses an important distinction when it notes that John H. Gayer had previously filled out ownership reports using actual amounts paid as consideration. As pointed out by the Bureau, the ownership reports referred to by Omaha did not relate to intra-family transfers. Whenever John H. Gayer reported intra-family transfers he did it on the basis of the par value of the shares. The point simply is, that in his mind, John H. Gayer honestly believed that he was properly reporting the intra-family transfer in August 1976. No party has suggested that Gayer intended to deceive anyone in 1976 when he filed the first Big Country ownership report. Whenever John H. had to supply information about intra-family transfers subsequent to August 1976, he consistently adhered to his original treatment of the transaction. Viewed in this light it cannot be concluded that John H. Gayer intended to deceive the Commission or anyone else when he reported intra-family transfers. He merely followed his own treatment of such transactions. This treatment may have been technically incorrect, but it was honestly arrived at and consistently maintained by John H. Gayer whenever intra-family transfers were involved.

130. Thus, when John H. filed a second ownership report for Big Country on January 31, 1978, he again treated the intra-family transaction as a transfer at the original par value since no new

---

[48] Summit cites *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132 (Rev. Bd. 1982) as establishing the standards to be used in cases involving misrepresentation and lack of candor issues. However, while affirming the result reached by the Board, the Commission disavowed the Board's suggestion that lack of candor may involve failures to provide information in the absence of any deceptive intent and that lack of candor is inherently less serious than misrepresentation. The Commission also disavowed the Board's reference to 18 U.S.C. § 1001 as a guideline for Commission proceedings involving misrepresentation and lack of candor.

consideration changed hands. John H. had asked Dwight and Diane to make a gift of their shares to their brother. In order to treat his children fairly and as a matter of gratitude for Diane and Dwight's generosity, John H. expressed his intent to give Dwight and Diane a "fair return" when station KBCR was ultimately sold or when they needed the money. In John H.'s view, his commitment to Dwight and Diane was not a standard, business *quid pro quo*. Rather, he viewed the whole affair as involving a family business and his commitment to Dwight and Diane was viewed by John H. as a gift to them, a gift motivated by his gratitude for his children's generosity toward one another. John H. did not view his commitment as "consideration paid" for Dwight and Diane's transfer to John G. Accordingly, John H. filled out the 1978 ownership report just as he had the 1976 report. Moreover, as the Bureau points out, in January of 1978, there was no motive for John H. to conceal the nature of the transaction from the Commission. The fact that John H. was assisting Grand Radio in its financing was made clear in Grand's application. There would have been no point in disclosing John H.'s loans and guarantees to Grand, but concealing an oral, ambiguous promise of a future gift. Omaha's suggestion that John H. wished to conceal his involvement in the intra-family transfers lacks a factual basis. As the Bureau correctly points out, the common control question had not been raised at that point.

131. After John G. Gayer became President of Big Country in mid-1978, he also had occasion to file an ownership report concerning an intra-family transfer from his father to his mother. He asked his father for the information necessary to complete the form and, not surprisingly, John H. advised his son to use the original par value as the consideration. John G. testified that he did not know the details of the transfer between his parents and had no reason to question his father's information. No question of common control had been raised at that time, so there was no motive to conceal any facts from the Commission. Finally, there is no nexus between the transfer of Big Country shares from his father to his mother and John G.'s Summit application. Thus, the record will not support a misrepresentation or lack of candor finding with respect to the Big Country ownership reports filed by either John H. or John G. Gayer.

132. With respect to John H. Gayer's use of the word "purchase" in his affidavit filed to oppose Levin's Petition to Deny, the significant fact was disclosed, *i.e.*, that John G. acquired his Big Country shares as a result of intra-family transactions. This was precisely the point Levin sought to establish and John H. Gayer did not try to conceal it. He admitted at the hearing that "obtained" would have been a better word than "purchased", but, the fact remains that the intra-family nature of John G.'s acquisition of shares was never denied. In fact, in that same affidavit John H. candidly stated that it was always his and his wife's intention to

assist their son, John G. in establishing himself in the broadcasting industry and it was for this reason that Big Country was formed and filed applications for broadcast stations. In view of these statements, it makes no sense to suggest, as Omaha does, that John H. used the word "purchase" to mislead the Commission. This is especially so, since Levin had already referred to the intra-family transfers as trades of broadcast interests for "token payments."[49] In sum, as the record indicates and as the Bureau has concluded, no motive was shown for John H. to intentionally deceive anyone when he filed his affidavit. Though the use of the word "purchase" was imprecise,[50] in the context of the entire affidavit, the error was not significant. All significant facts were fully disclosed by John H. Gayer.

133. The final element of this issue concerns the answers to Levin's interrogatory 5(i) filed by John G., John H. and Dwight Gayer on behalf of Summit, Eagle and Grand respectively. Before considering the Gayers' responses to interrogatory 5(i), it is pertinent to point out that Levin's interrogatory 5 had twenty parts to it and part (i) itself, had six subparts (Western Slope Ex. 21). A brief perusal of Levin's interrogatories demonstrates the complexity of his inquiry. The controversy focuses on the last subpart of 5(i) which called for information as to the consideration paid or promised for the relinquishment of an interest in broadcast stations. Gayers' responses to the remainder of Levin's interrogatories are not under attack. Moreover, at the depositions held in May and June 1981, the Gayers testified in detail about the circumstances relating to the intra-family transfers. At these sessions, John H. Gayer disclosed the facts concerning the payments to Dwight and Diane Gayer. This testimony, within months of the filing of the interrogatory answers, standing alone, belies any motive to conceal or deceive. Turning to the responses, John G., on behalf of Summit, inadvertently failed to answer the last subpart of 5(i). No party has challenged Summit's contention that this inadvertent omission should not give rise to a finding of misrepresentation or lack of candor. The Presiding Judge agrees that no adverse determination is warranted.

134. When John H. answered the last subpart of interrogatory 5(i), he stated that "all stock was purchased at par value." This is consistent with John H.'s treatment of intra-family transfers on the Big Country ownership reports. It is true that John H. had paid Dwight and Diane $15,000 each to fulfil his commitment to them. John H. conceded that he probably should have reported the $15,000 payment in the answer to the interrogatory. However, John H. did not view his payment as "consideration", a *quid pro quo*, for the

---

[49] See "Petition To Dismiss Application," filed November 15, 1978 by Levin, page 8, footnote 3.

[50] It should be noted that John G. did purchase 1,000 shares of Big Country from the corporation by cancelling $1,000 of debt owed to him by the corporation.

transfer of stock. He had asked two of his children to help a third child; they agreed; as a parent John H. wished to treat his children fairly and determined to give his children a gift to make up for what they gave to their brother. John H. simply did not view the transaction as a sale for consideration and did not treat it as such, either in the ownership reports or the interrogatory answer. John H.'s explanation is credible, particularly in light of his treatment of the transaction in his ownership reports. Omaha and the Bureau suggest that John H. was attempting to conceal an involvement in Grand's effort to meet its financial issue. However, as amply demonstrated by the findings (see Finding 84), the $15,000 payments to Dwight and Diane Gayer were not necessary for Grand to meet its financial issue. Accordingly, there was no motive for John H. Gayer to conceal his payments to his children.

135. Similarly, Dwight Gayer cannot be found to have misrepresented facts or lacked candor. Levin's interrogatory 5(i) requested information relating to Big Country. Dwight relied on his father for the information to answer interrogatory 5(i). Dwight testified that he did not relate his receipt of $15,000 in 1980–1981 to consideration for giving his Big Country stock to his brother in 1977. Dwight Gayer testified truthfully and his explanation is credited. In this connection, in view of the information he received from his father and the nature of the circumstances surrounding the Gayer family transfers, it is not surprising that Dwight utilized the information without change. Moreover, as discussed above, Dwight had no motive to conceal the $15,000 payment. He had structured Grand's finances to meet the financial issue without regard to the $15,000 payments. There is, therefore, no basis for concluding that Dwight Gayer intended to misrepresent or conceal facts. Accordingly, issue 28 is resolved in favor of Summit, Grand, their respective principals, and John H. Gayer.

### *Section 73.1120 Issue Against Summit*

136. Section 73.1120(b) of the Commission's Rules requires standard broadcast applicants proposing to serve more than one community to show: (1) that a satisfactory main studio is provided for each community; (2) that the station can and will provide a substantial number of local live programs from each community; and (3) that the program origination requirements of Section 73.1130 would place an unreasonable burden on the station if it were licensed to serve only one community. In lieu of this showing, the applicant may request a waiver of the rule by showing that the communities it proposes to serve clearly enjoy "an identity of interests for programming and other purposes." *Saul M. Miller*, 4 FCC 2d 150, *rev. denied*, 8 RR 2d 590, *aff'd per curiam*, 9 RR 2d 2031 (D.C. Cir. 1976), and *Hymen Lake*, 46 FCC 2d 560, 565 (Rev. Bd. 1974); *Progressive Broadcasting Company*, 54 FCC 2d 638 (Rev. Bd. 1975).

137. Summit requests a waiver of Section 73.1120(b). It contends that Dillon, Frisco and Silverthorne enjoy the requsite identity of interest. The findings support Summit's contention. The three mountain resort communities are located around Dillon Reservoir in close proximity to each other. All are located in Dillon County. The economy of each community is based on tourism and recreational activities and all participate in a county wide movement to promote tourism. They are part of the same county school district and share junior and senior high schools. A common concern is the water level of Lake Dillon, which is maintained by the City of Denver Water Board. In addition, the county provides services to each community, *i.e.*, housing, planning, social services and senior citizens services. Residents of the three communities belong to the same civic groups and churches and many travel between the three towns to work. Also, Silverthorne and Dillon have cooperated in constructing a joint sewer authority and have established a joint Chamber of Commerce. Further, while each town has its own fire and police departments, a mutual aid agreement is in existence. Additionally, Summit has proposed programming to meet the needs and interests of the three communities. In this connection, Summit would provide the three communities with their first transmission facility. It is therefore concluded that Dillon, Frisco and Silverthorne have an identity of interest for programming and other purposes sufficient to warrant tri-city licensing. Consistent with the cited precedent, Summit's request for a waiver of Section 73.1120(b) is granted. Issue 6 is resolved in favor of Summit.

### *Areas and Populations and 307(b) Issues (Levin, Summit and Dillon)*

138. Section 307(b) requires a "fair, efficient and equitable distribution of radio service" among applicants for different communities. A choice will be made under Section 307(b) if the record reveals "sufficient differences between the proposals to permit a meaningful 307(b) choice." *WHW Enterprises, Inc.*, 89 FCC 2d 799, 812 (Rev. Bd. 1982). The Presiding Judge discerns no significant 307(b) choice between Summit's proposal to divide its efforts between Dillon, Frisco and Silverthorne and Levin's and Dillon's proposal to serve Dillon on a primary basis and the other two communities on a secondary basis. This determination does not turn on any judgment whether Summit's tri-city proposal is good or bad but rather on the conclusion that it does not provide a significant 307(b) advantage on the basis of the record in this case. See *Casey Broadcasting Company, Inc.*, FCC 83–61, released February 24, 1983.

139. The findings establish that none of the parties are entitled to a preference under the transmission and reception aspects of the 307(b) issue. A comparison of the three communities provides no basis for a meaningful distinction. The communities of Dillon, Frisco,

and Silverthorne, Colorado share a close identity of interest and are not distinguishable in character. They are mountain communities which are essentially contiguous. The economy of each community is based on tourism and recreational activities and all participate in a county wide movement to promote tourism. The commercial, governmental and cultural attributes of each of the three towns is relatively equivalent. All three communities are heavily dependent on the county for essential services. Moreover, all three communities will receive city-grade coverage from each of the three applicants. Further, the facility applied for, *i.e.*, a daytime AM station on 1130 kHz with a power of either 5 Kw nondirectional (in the case of Levin and Dillon) or 10 Kw (5 Kw during critical hours) directional (in the case of Summit) is intended to provide a regional service (and not a local service, *i.e.*, 1 Kw or less during daytime.[51] Summit's argument that its tri-city licensing proposal is superior and deserving of a preference is without substance and is rejected. In fact, the three proposals are strikingly similar. All the applicants have ascertained the problems, needs and interests of the service area, which includes the communities of Dillon, Frisco, and Silverthorne, and have proposed programming responsive to those needs and interests of the service area.[52] In addition, unlike *Casey*, Summit does not propose to place studios in any of the three communities. Further, Summit does not propose any remote program origination equipment and therefore will not have the capability to originate live programs from the communities of Dillon, Silverthore and Frisco. Thus, whether the facility is licensed to Dillon or to all three communities, is a distinction without difference. It is, therefore, clear that Summit's tri-city licensing proposal is, in reality, nothing more than a "gimmick" designed to secure a Section 307(b) preference.[53] In sum, there is less justification for granting a 307(b) preference in this case than in *Casey*.

140. Turning to the reception aspects of 307(b), Summit will provide service to 1,440 more people than will Levin and will service 1,269 more people than will Dillon. In addition, Summit will provide a third service to 108 people not served by either Levin or Dillon; a fourth service to 686 people not served by Levin, and to 645 people not served by Dillon; and a fifth service to 646 people not served by Levin and 516 people not served by Dillon. None of the applicants serve white or gray areas (provide a first or a second service).

---

[51] See Section 73.21 of the Rules.

[52] Official notice taken of Levin application, File No. BP 20,581, Exhibits 3–6; Dillon Application, File No. BP 780728AO, Exhibits 4–8).

[53] In this regard, John G. Gayer, a principal of Summit, perceived that there might be a comparative advantage in proposing tri-city licensing and viewed this as a factor which could be exploited to Summit's advantage (Tr. 1037–40).

Summit's slight advantage does not justify a 307(b) determination in its favor. *Resort Broadcasting Co.*, 41 FCC 2d 640 (Rev. Bd. 1973).

141. Summit has cited a number of cases in support of its contention that its reception advantage merits a 307(b) preference. However, as pointed out by the Bureau, the cases are all distinguishable. *WMVM* Associates, 43 RR 2d 1532 (1978) involved the question of republication under Section 73.3525(c), not an affirmative determination whether a 307(b) preference should be awarded. In addition, the remaining applicant there provided a second nighttime service to its community of license and thus served a gray area.[54] As noted, none of the applicants here serve white or gray areas. In *Campbell and Sheftall*, 7 FCC 2d 658 (Rev. Bd. 1967), a 307(b) preference was awarded to an applicant because it provided 1 mV/m service to 109,412 persons as opposed to its competitor's 80,600. In addition, the preference was granted because a larger white area was served (19,461 people as opposed to 13,916 people). Finally, the preferred applicant provided a first nighttime service to its community. Here the additional service disparity is *de minimis* and no white or gray areas exist. Finally, in *Nelson Broadcasting Co.*, 5 FCC 2d 211 (1966), the preferred applicant provided a first service to 4,591 people and a second service to 17,632 people whereas the competing applicant served no white or gray areas. Since Section 307(b) consideration are not dispositive, a comparative evaluation of the applicants is necessary.

### *Contingent Comparative Issue*
### *(Levin, Summit and Dillon)*

### *Diversification of Control of the Media of Mass Communications*

142. Levin and Dillon have no media interests. John G. Gayer, 50% owner, officer, and director of Summit held a 43.75% interest in Big Country Radio, Inc., licensee of stations KBCR-AM-FM, Steamboat Springs, Colorado. The stations were sold in June 1981. Summit argues it should not receive a comparative demerit under the diversification criterion for its ownership interest in Big Country. In support of this contention, Summit states that the basic contract terms for sale of the stations had been orally agreed to prior to issuance of the hearing designation order on December 4, 1980. However, the contract was not executed until January 6, 1981 (more than a month after the designation order) and neither the Commission nor the parties to this proceeding were notified of the sale of the stations until sometime subsequent to the execution of the sale agreement. In order to avoid a comparative demerit under the diversification criterion, a party, prior to designation must make an

---

[54] Dillon, Frisco and Silverthorne each receive at least five existing aural broadcast services.

unequivocal commitment to dispose of the media interest and adequately apprise the other parties of the intent to dispose of the media interest. *WHW Enterprise, Inc., supra*, 89 FCC 2d at 813. Summit has not satisfied either of these conditions. Therefore, for purposes of the diversification criterion, the 43.75% interest in Big Country is attributable to Gayer. Under the diversification criterion, media holdings in the proposed community of license are generally of the most significance, followed by holdings in the remainder of the proposed service area and then on the regional and national level. *Policy Statement*, 1 FCC 2d 393, 394–5 (1965). Since Gayer's interest is not in the proposed community of license and his media interests are limited, Dillon and Levin will receive a moderate, rather than substantial preference over Summit.

## *Best Practicable Service To The Public*

### *Integration of Ownership and Management*

143. Levin, an individual applicant, proposes to be integrated full-time as general manager. Summit argues that Levin's ties to Denver, the distance between Denver and Dillon, the likelihood of inclement weather and closed roads and Levin's stated intent not to move to Denver cast doubt on whether there is reasonable assurance that Levin can effectuate his integration policy. Summit's contentions are rejected. Levin proposes to spend 40 hours at the station (5 days a week) excluding drive time. There is no record evidence to support Summit's speculation that his proposal is incapable of effectuation. Thus, no evidence has been offered indicating that Levin's ties to Denver preclude effectuation of his integration pledge. Further, the 74 mile distance between Denver and Dillon (approximately 1½ hours one way during inclement weather) is not so great as to raise doubt as to the integrity of the integration proposal. In addition, Summit has not offered any evidence as to the frequency of inclement weather or, more important, the frequency of closed roads. Moreover, Levin also plans to stay over in Dillon from time to time. It is reasonable to assume that he will do so on those occasions when inclement weather and closed roads preclude his commuting from Denver. Summit also contends that Levin's integration proposal is too nebulous since the nature of Levin's duties as general manager have not been particularized. Unlike other supervisory positions, the duties and responsibilities of a general manager are so clearly understood that further elaboration is unnecessary. It is significant that Summit, although it had the opportunity, did not inquire of Levin as to his duties as general manager. In the absence of evidence indicating that Levin will not perform the duties normally attributable to the position of general manager, there is no basis to question his proposal. Levin is entitled to 100% quantitative integration

credit. Levin does not propose to move to Dillon. In addition, he is not a member of any civic organization in Dillon or the proposed service area and has no past broadcast experience. Levin, therefore, receives no qualitative enhancement.

144. Summit proposes the full-time integration of Crass, a 50% owner, as general manager. Summit also proposes the part-time (21 hours a week) integration of John G. Gayer. Summit is entitled to 50% full-time and 50% part-time integration credit. Summit's proposal is qualilatively enhanced in that Gayer and Crass have prior broadcast experience and both propose to move to a location within the proposed service area in the event of grant of their application.

145. Dillon is owned 100% by Theobald who proposes to be integrated full-time as the general manager of the proposed station. Summit's contention that Dillon's integration proposal is incapable of effectuation is without support in the record and is rejected. Theobald has unequivocally committed himself to working a minimum of 40 hours a week as general manager of the proposed station. No evidence has been submitted demonstrating that Theobald's current business and civic activities will preclude effectuation of his integration proposal. Moreover, as pointed out by Dillon, Theobald has made clear these time commitments would be modified to accomodate his commitment to be full-time general manager. Summit's contentions concerning the possibility that Theobald may have to devote time in the future to work on his mining properties is sheer speculation and conjecture. The findings disclose that Theobald has not decided when or even whether to proceed with the mining venture. Nor has he decided how active he would be in the venture even if a decision was made to go forward. Thus, his statement that the time devoted to this future venture could range from 2 hours to 40 hours a week is purely hypothetical and provides no basis for questioning the integrity of Dillon's integration proposal. Dillon is entitled to 100% quantitative integration credit. Dillon's integration proposal is qualitatively enhanced by the fact that Theobald has resided in the service area of the proposed station since 1973, has approximately four years past broadcast experience as a general manager and principal of KLGT (FM), Breckenridge, Colorado, and is and has been actively engaged in civic and community affairs in the service area of the proposed station.

### *Efficient Use Of The Frequency*

146. Summit will provide service to 1,440 more people than will Levin and will serve 1,269 more people than will Dillon. Moreover, Summit will provide a third service to 108 people not served by either Levin or Dillon, a fourth service to 686 people not served by Levin, and to 645 people not served by Dillon, and a fifth service to 646 people not served by Levin and 516 people not served by Dillon.

Summit is entitled to a slight preference over Dillon and Levin for its proposal to bring additional service to populations that are relatively undeserved. *CJL Broadcasting, Inc.*, 88 FCC 2d 750 (Rev. Bd. 1982). As between Levin and Dillon, Dillon is entitled to a slight preference for its more efficient use of frequency spectrum in bringing additional service to undeserved populations. *Id.*

### *Auxiliary Power Equipment*

147. Levin is the only applicant proposing to install an auxiliary power generator. Accordingly, Levin merits a preference of minor significance under this factor. See *Addendum to Policy Statement On Comparative Broadcast Hearings*, 2 FCC 2d 667 (1966). *Barnes Enterprises, Inc.* 69 FCC 2d 1957, 1963 (Rev. Bd. 1978). Preference for an auxiliary power source is intrinsically of less significance than other aspects of the comparative analysis. *WVOC, Inc.*, 45 FCC 2d 420, 424 (Rev. Bd. 1974).

## *Final Comparative Evaluation*

148. Levin and Dillon have been given a moderate preference over Summit under the diversification criterion. Under the best practicable service, Levin and Dillon, both with 100% full-time integration are entitled to a substantial preference over Summit with only 50% full-time and 50% part-time integration. *Scott and Davis Enterprises, Inc.*, 50 RR 2d 1251 (Rev. Bd. 1982); *Poets Seat Broadcasting, Inc.*, 78 FCC 2d 1080 (Rev. Bd. 1980); *KALT-FM, Inc.*, 49 FCC 2d 61 (Rev. Bd. 1974). Summit has received a slight preference over Dillon and Levin under the efficiency aspect of the best practicable service criterion. Levin's and Dillon's moderate preference for diversification and substantial preference for integration far outweigh Summit's slight preference for more efficient use of the frequency. As between Levin and Dillon, since the quantitative integration of both applicants is equal, the qualitative comparison becomes decisive. Based upon Theobald's local residency, past broadcast experience, and involvement in local civic activities, Dillon is entitled to a substantial qualitative preference over Levin. In addition, Dillon's slight preference for more efficient use of the frequency outweighs Levin's proposal to install an auxiliary power generator. Accordingly, Dillon is the clear winner. It is therefore concluded that a grant of Dillon's application will better serve the public interest, convenience and necessity.

## *Areas and Populations and 307(b) Issue*
## *(Grand and Jefferson)*

149. The findings establish that Jefferson is entitled to a 307(b) preference. Grand proposes to serve Fraser, Colorado. Jefferson

proposes to serve Golden, Colorado. Neither community has an aural transmission service. Frazer's population is 470[55] while Golden's population is 12,237. As pointed out by the Bureau, the population ratio is more than 26 to 1. In addition Golden's population has increased 24.65% since 1970. Golden's greater population, rapid growth and greater civic, economic, commercial and industrial development and importance establish a greater need for an outlet of expression than does Frazer. *DuPage County Broadcasting, Inc.*, 19 FCC 2d 250, 255 (Rev. Bd. 1969); *Cornwall Broadcasting Corp.*, 89 FCC 2d 704 (Rev. Bd. 1982). See also *Miner Broadcasting Service, Inc.*, 23 FCC 402, 442 (1957). Grand argues despite these important disparities, that it merits a preference under the transmission priority. It contends it is in greater need of a first local transmission service in view of the importance of Fraser to the surrounding Winter Park area of Colorado, citing *Radio Haddonfield, Inc.*, 3 RR 2d 25 (1964). It is further contended that Golden's independent significance is overshadowed by its close proximity to and association with the Denver unbanized area and that Golden's transmission needs are at least partially met by a plethora of broadcast stations licensed to Denver and other communities in the Denver SMSA. None of these contentions are supported by the record and they are rejected. Initially, *Radio Haddonfield, Inc.* is inapposite since none of the characteristics present in the winning city (Salem) is present here. Fraser is not the county seat of Grand County and there is no evidence indicating that it serves as the political, governmental or commercial center for Grand County or the surrounding area. Thus, there is no basis for Grand's argument that Fraser's importance to the surrounding area is greater than Golden's. Such an argument is particularly inappropriate since Golden, unlike Fraser, is the county seat. Moreover, the findings establish that Golden is an independent community of substantial size and importance. No evidence has been offered showing that Golden is merely a "bedroom community" or that its citizens are wholly or even partially dependent on Denver for their needs. Grand's argument rests solely on speculation and conjecture. Finally, Grand did not request a programming issue and there is no evidence indicating that Golden's needs are met in whole or in part, by Denver area stations.

---

[55] Grand argues that the population of Frazer approximated 3500 rather than the 470 persons shown by the 1980 U.S. Census figures. Grand relies on a statement by Dwight Gayer at the hearing concerning a study conducted by officials of the Department of Development in Grand County (Tr. 2496–97). However, notwithstanding the Presiding Judge's admonition (Tr. 2498), Grand did not offer any evidence supporting use of the study and there is no basis to determine whether the unofficial enumeration is reliable, reasonable and accurate. Consequently, under the circumstances, the 1980 U.S. Census data is the only source of reliable population data. *Hyman Lake*, 46 FCC 2d 560, 564 (Rev. Bd. 1974), cited by Grand, is inapposite since in that case the applicant submitted evidentiary support showing that the unofficial numeration was reliable, reasonable and accurate.

150. It is recognized that Grand would provide a second nighttime service to 626 persons. However, this reception service advantage does not outweigh Jefferson's overwhelming first transmission service preference. None of the cases relied upon by Grand requires a different conclusion. In *Robert J. Reverman*, 78 FCC 2d 1110 (1980), a smaller community was preferred over a larger community. However, the larger community already had two local stations. The preferred community only had one. In *Kittyhawk Broadcasting Corp.*, the smaller community with one aural facility was preferred over the larger community with two transmission facilities. The instant case, unlike that case, involves communities where neither has a transmission facility. In addition, in *Kittyhawk*, the applicant for the smaller community would bring a second primary service to 8,506 persons (compared with 626 under Grand's proposal) and eliminate a pocket of interference involving 1,040 persons. In *Resort Broadcasting, Inc.*, 41 FCC 2d 640 (1973), no 307(b) preferences were awarded. It should be noted, however, that, unlike the facts here, in *Resort*, both communities were small, the populations were substantially similar, and the commercial, governmental and cultural attributes were relatively equivalent. On the basis of the foregoing 307(b) considerations, Jefferson's application will be granted and Grand's application denied.

### *Contingent Comparative Issue (Grand and Jefferson)*[56]

151. Grand's principals have no media interests. On the other hand, as noted in paragraph 113, *supra*, Jefferson's principals have extensive broadcast holdings. Grand is deserving of a substantial preference over Jefferson under the diversification criterion. With respect to the integration criterion, none of Jefferson's principals are proposed to be integrated into ownership and management. In contrast, Grand proposes 50% full-time and 50% part-time integration. There is no basis to question Dwight Gayer's commitment to serve full-time as general manager and his proposal is credited. However, Diane Gayer's proposed part-time integration cannot be credited since she has not demonstrated a reasonable likelihood that she will be able to effectuate her proposal to work 21 hours a week. Diane Gayer has testified that the 21 hours a week she will spend on behalf of the station would be one or two days each weekend and five hours a week at home. Diane Gayer is employed full-time by an architectural firm in Denver and intends to continue her career in architecture. Ms. Gayer also testified that she sometimes has to work at the firm on weekends. She is also the President of Artemis Design,

---

[56] Although 307(b) considerations are dispositive and mandate a grant of Jefferson's application, consistent with Commission precedent, the applicants are comparatively evaluated, *infra*.

a company which she and her husband founded in 1979. Ms. Gayer's commitments raise substantial doubt concerning her proposal to travel from Denver to Fraser on the weekends and spend 16 hours at the station. Further, approximately five of these twenty-one hours of work are to be performed at home. There is no indication in the record as to what work she will perform at home on behalf of the station and, absent such evidence, that part of her integration proposal cannot be accepted. Under the circumstances, Ms. Gayer's professed intention to devote 21 hours a week to the station must be dismissed as inherently incredible. No integration credit can be given where a principal proposes to work fewer than 20 hours per week. *Midwest Broadcasting Company*, 70 FCC 2d 1489 (Rev. Bd. 1979), *review denied*, FCC 79–397, released June 22, 1979. Thus, while it appears that Ms. Gayer will devote some time to station affairs, although less than 20 hours, no integration credit can be awarded. Notwithstanding, Grand's 50% full-time integration proposal still merits a substantial preference under the integration criterion.[57] In summary, Grand is entitled to a substantial preference under the diversification and integration criteria and would be the winner if the case was decided on comparative factors.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the applications of Dillion Broadcasting Company and Jefferson Wireless Company ARE GRANTED and the applications of Alan K. Levin, Summit Radio, Inc. and Grand Radio, Inc. ARE DENIED.[58] [59]

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH CHACHKIN, *Administrative Law Judge*

---

[57] Grand's integration proposal is qualitatively enhanced by Dwight Gayer's prior broadcast experience, local residence and involvement in community affairs. Grand would also be entitled to a preference for its more efficient use of the frequency in bringing a second nighttime service to 626 persons.

[58] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

[59] The Motion For Leave To File Corrected Proposed Findings And Conclusions Of Law filed October 19, 1982 by Levin is granted and the corrected proposed findings are accepted.

Costs Allocation of
Joint Boards
Separation Procedures

**Joint Board announces basic principles and structure for NTS cost allocations, and requests further comments on certain limited issues. Joint Board also recommends that Commission authorize it to monitor implementation of the separations and access charge decisions.**

*–Amendment of Part 67*
CC Docket 80–286

FCC 83–564

BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In the Matter of Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board | CC Docket No. 80–286 |

## DECISION AND ORDER

(Adopted December 1, 1983; Released February 15, 1984)

BY THE COMMISSION:

## I. *Introduction*

1. In this proceeding the Commission is considering changes in the procedures for allocating non-traffic sensitive (NTS) and traffic sensitive (TS) local exchange plant costs between the interstate and intrastate jurisdictions, as well as other changes in the *Separations Manual (Manual)* used by telephone companies to apportion costs. This proceeding was instituted for the primary purpose of developing a new method for allocating NTS local exchange costs between the jurisdictions. On September 26, 1983, the Federal-State Joint Board issued its *Second Recommended Decision and Order* in CC Docket No. 80–286, 48 Fed. Reg. 46556 (October 13, 1983), containing its recommendations for resolution of the remaining issues in this proceeding.[1] The Chief, Common Carrier Bureau, acting pursuant to delegated authority requested comments on the Joint Board's recommendations. *Order Requesting Comments*, Mimeo No. 6725, released September 26, 1983. Comments were filed October 17, 1983

---

[1] For a discussion of the history of this proceeding and related developments, see paragraphs 4 through 9 of the Joint Board's Second Recommended Decision and Order.

and replies were filed October 27, 1983. All together the Commission received almost fifty filings from thirty different parties. The Commission hereby adopts the Joint Board's recommendations with a number of changes and clarifications. We also adopt as our own the Joint Board's analysis in support of the proposed changes contained in its *Second Recommended Decision and Order*, except as those recommendations are modified herein. In a number of areas we have also expanded on the Joint Board's discussion in responding to various contentions raised in the comments and replies.

2. The *Second Recommended Decision and Order* proposes replacing the frozen Subscriber Plant Factor (SPF) as the basis for allocating most NTS plant. Instead, a 25 percent interstate allocation factor would be uniformly applied in all study areas. The transition from frozen SPF to the 25 percent base factor apportionment would begin in 1986 and would be implemented in four steps. This basic allocation would be supplemented by an additional interstate NTS allocation for high cost areas to help keep local rates affordable. The Joint Board also recommended capping subscriber access charges at twice the national average to avoid excessive end user charges in study areas with very high costs. The Joint Board has recommended a number of other changes as well.

3. Specifically, the Joint Board proposed the following: (1) a basic 25 percent interstate allocation factor for all study areas[2] applicable to investment in non-wideband subscriber loops used jointly for exchange service and toll message services (excluding WATS access lines) and inside wiring as well as the maintenance and depreciation expenses and reserves associated with these plant categories;[3] (2) an additional lump sum interstate expense allocation for study areas with relevant unseparated (total intrastate and interstate) NTS local exchange costs[4] in excess of 115 percent of the national average, based on a series of cost bands which provide a higher percentage interstate allocation for costs in the higher cost bands;[5] (3) division of

---

[2] A study area usually consists of a telephone company's service territory within a particular state.

[3] The Joint Board also recommended application of the basic 25 percent allocation factor to Category 8 Subscriber Line Circuit Equipment associated with such jointly used non-wideband subscriber loops.

[4] The relevant unseparated NTS costs as defined by the Joint Board include: (1) a return component for net plant investment in non-wideband subscriber loops jointly used for exchange and message toll services (excluding WATS access), calculated on the basis of the actual debt/equity ratio, the actual cost of debt and the authorized rate of return on equity for interstate access service; (2) associated maintenance and depreciation expenses; and (3) an amount of general expenses, certain other operating expenses, and taxes proportionate to the net investment in non-wideband subscriber line outside plant jointly used for local exchange and message toll services excluding WATS access.

[5] The Joint Board stated that this additional interstate allocation was to be calculated after the basic state and interstate allocations had been determined pursuant to the other provisions of the *Separations Manual*. It would be deducted

the interstate end user common line revenue requirement calculated pursuant to Part 69 of the Commission's rules into a subscriber access amount, which will be reflected in subscriber access charges, and a high cost amount, which will be recovered through carrier's carrier access charges to prevent subscriber access charges from exceeding 200 percent of the national average; and (4) continued use of the frozen percentage Subscriber Plant Factor (SPF)[6] until January 1, 1986, followed by a transition period during which the 25 percent basic interstate allocation for jointly used subscriber loops, inside wire, and associated maintenance, depreciation, and reserves as well as the additional interstate expense allocation for high cost areas will be phased-in in four equal steps, subject to the limitation that no study area is to experience a decrease in its interstate NTS allocation of more than 10 percentage points in any one year.

4. The other changes in the allocation of local exchange plant recommended by the Joint Board include: (1) minor revisions in the outside plant categories to track the categories used in Part 69 of the Commission's rules; (2) direct assignment of subscriber loops used exclusively for intrastate or interstate private line or WATS access; (3) additional *Separations Manual* language to ensure that the benefits of the customer premises equipment (CPE) phase out plan previously adopted by the Commission in this proceeding[7] continue to flow to the local Bell Operating Companies after the embedded CPE is transferred to AT&T under the provisions of the *Modification of Final Judgment* (MFJ),[8] with the interstate CPE related allocation based on the frozen percentage SPF; (4) continued allocation of NTS Category 6 Central Office Equipment (NTS Category 6 COE) to the interstate jurisdiction on the basis of frozen SPF pending further study of the need for changes in the categorization and allocation of this plant; (5) the adoption of seven (calendar) day traffic studies in lieu of five (business) day studies; (6) the inclusion of unweighted ENFIA (Exchange Network Facilities for Interstate Access) dial

---

from the state allocation calculated pursuant to the other *Manual* provisions, lowering the state revenue requirement and keeping intrastate rates lower than they otherwise would be.

[6] SPF is the allocation factor for NTS plant that was approved by the Commission in 1970. *Separations Procedures*, Docket No. 18866, 26 FCC 2d 247 (1970). The *Separations Manual* renders SPF as equal to $.85\ \text{SLU} + (2\text{SLU} \times \text{CSR})$, with SLU (subscriber line usage) as a measure of relative use and CSR (composite station rate) as a factor related to interstate toll rates at the average length of haul for interstate toll calls. The multiplicative nature of the formula magnifies the allocative impact of increases in relative interstate usage.

[7] Amendment of Part 67 of the Commission's Rules, CC Docket No. 80–286, 89 FCC 2d 1 (1982), *modified*, 90 FCC 2d 52 (1982).

[8] United States v. AT&T, 552 F. Supp. 131 (1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983). The Commission approved the transfer of embedded CPE to AT&T Information Systems (ATTIS), subject to certain conditions, in a Report and Order adopted November 23, 1983. CC Docket No. 81–893, FCC 83–551, released December 15, 1983.

equipment minutes of use in the allocation of traffic sensitive local dial switching equipment; (7) the revision of some language in the outside plant and central office equipment *Manual* provisions to treat explicitly digital electronic host/remote complexes; and (8) the treatment of open end FX (Foreign Exchange) and CCSA/ONALS (Common Control Switching Arrangement/Off Network Access Line Service) used in interstate service as interstate for separations purposes. A number of other technical changes to the *Manual* were proposed by the Joint Board. Many of these were intended to simplify or modernize the separations procedures. The most significant of these other technical changes is the change from traffic units to weighted standard work seconds as the basis for the allocation of certain classes of manual office and operator expenses. The Joint Board stated that each of these "other" matters has little effect on the allocation of costs between the jurisdictions.

5. As previously indicated, the Commission is adopting these proposed changes in jurisdictional separations procedures with a number of relatively minor changes and clarifications. The most significant of these involves expansion of the plant categories considered in determining whether a study area qualifies for an additional interstate allocation and in calculating the amount of the additional allocation. We find that drop and block wire and Category 8.13, Subscriber Line Circuit Equipment, should be included in these calculations. We have also decided to require all local telephone companies to submit the data used in calculating the additional interstate allocation and the high cost portion of the end user access charge to the National Exchange Carrier Association (*NECA*)[9] in June 1984, instead of 1985. This is important so that we will be better able to judge the effects of the formula for computing the Universal Service Fund and make adjustments in the level of coverage or assistance mechanism if necessary. As discussed below, we are asking the Joint Board to study this subject. We have also decided to defer consideration of the proposal for direct assignment of WATS access lines and to continue the existing separations treatment of these facilities pending further recommendations by the Joint Board.

6. The Joint Board did not recommend any comprehensive changes in the apportionment of Category 6 Central Office Equipment. It concluded that most questions relating to the apportionment of Central Office Equipment should be examined at a later date. Our *Notice of Proposed Rulemaking* in this proceeding stated that we expect to refer interexchange separations questions to this Joint Board or another Joint Board at a later date. 78 FCC 2d 837 at 838 (1980). We still expect to institute such a proceeding and agree

---

[9] The NECA is to calculate the size of the Fund and the amount of assistance for each study area.

that some questions relating to traffic sensitive exchange plant should be included. We will determine the precise scope of that proceeding when we issue a *Notice* or *Supplemental Notice of Proposed Rulemaking.*

7. The major areas addressed in the comments are discussed below. Each section contains a brief summary of the Joint Board's recommendation and the relevant comments[10] as well as our conclusions. Further information on each of these topics is contained in the Joint Board's *Second Recommended Decision and Order*.

## II. *Basic Allocation Factor*

8. The Joint Board recommended a basic 25 percent interstate allocation for NTS local exchange plant costs[11] for all study areas effective January 1, 1986, subject to an appropriate transition period. Frozen SPF would continue to be used through the end of 1985. In particular, the Joint Board recommended application of the basic 25 percent allocation factor to investment in inside wiring, the new Subscriber Line Outside Plant Category 1.33 which includes non-wideband loops between central offices and subscriber premises used for message services, including WATS access lines, and Category 8.13 Subscriber Line Circuit Equipment associated with OSP Category 1.33, as well as the associated maintenance and depreciation expenses and reserves. The Joint Board recommended continued use of frozen SPF for purposes of allocating CPE investment and associated expenses until CPE is completely phased out of the separations process. It also recommended the application of frozen SPF to NTS Category 6 COE pending review of the need for changes in the treatment of the local dial switching equipment.

9. A substantial majority of the parties filing comments which addressed this question expressed support for the new 25 percent basic allocation factor for NTS local exchange plant. A number of those supporting the 25 percent basic allocation factor expressed the view that this allocation methodology is desirable only if the Commission's access charge plan[12] is implemented without major changes. Several of these parties including AT&T, Bell South and Southern New England Telephone Co. (SNET) suggested deferral of action on separations changes until access charges are in place. Pacific Telephone and Telegraph Co. and the Illinois Commerce

---

[10] A detailed summary of the comments and replies will be placed in the Docket of this proceeding.

[11] Currently, nationwide average SPF is frozen at approximately 26 percent, although the SPF factor for each study area is different. *See* note 6 *supra*.

[12] MTS and WATS Market Structure Inquiry, Phase I, (Access Charge Proceeding), Third Report and Order, 48 Fed. Reg. 10319 (March 11, 1983), *modified*, 48 Fed. Reg. 42984 (September 21, 1983), *further modified* FCC 84-36, released February 15, 1984, *appeal pending sub nom.* NARUC v. FCC, No. 83-1225 (D.C. Cir. filed March 1, 1983) (Access Charge Order)

Commission also emphasized the importance of implementing the new basic allocation factor in conjunction with the access charge plan. A number of parties opposed the approach recommended by the Joint Board. Bell Atlantic recommended continued use of the existing frozen percentage SPF until 1991. CP National Corp. also supported continued use of frozen percentage SPF. The New York Department of Public Service and the state of California argued that *Smith v. Illinois Bell Telephone Company*, 282 U.S. 133 (1930) requires a usage based allocation of NTS local exchange plant between the state and interstate jurisdictions. As a result, they take the position that use of an equal percentage interstate allocation for all study areas is illegal. MCI Telecommunications Corp. also argued that a 25 percent interstate allocation of NTS local exchange plant is illegal because it, like SPF, results in an excessive interstate allocation and subsidization of intrastate services.[13] Instead, MCI recommended federal preemption of jurisdiction over all NTS local exchange plant costs and recovery of these costs in accordance with rules prescribed by the Commission. Satellite Business Systems, Inc. supported MCI in recommending federal preemption of jurisdiction over all NTS local exchange costs.

10. We find that an equal percentage basic interstate allocation factor for NTS local exchange costs supplemented by a Universal Service Fund will produce fair and equitable results when used in conjunction with our access charge plan based on the substantial record before us in this proceeding. Under the access charge plan, a major portion of the interstate allocation of NTS local exchange costs (excluding CPE, inside wiring and NTS Category 6 COE) will eventually be recovered directly from subscribers through flat fee access charges. An equal percentage interstate allocation will result in subscriber access charges which are a function of the cost of service in each study area. In contrast to this, continued use of frozen percentage SPF or any other usage based allocation methodology will produce an irrational "crazy quilt" pattern of access charges with substantially different interstate NTS allocations, and, therefore, different flat fee subscriber access charges in areas with identical NTS costs. In fact, such an allocation methodology could result in high subscriber access charges even in areas with low costs if the interstate relative use is sufficiently high. Frozen SPF or any usage based NTS allocation methodology and the resulting high access charges in areas with high interstate relative use would also create demands for rate support in these areas which would be contrary to our efforts to direct assistance to high cost areas. A usage based allocation methodology which was not based on historical

---

[13] MCI also contends that the basic 25 percent allocation factor and the assistance for high cost areas constitute an illegal tax on MCI and its customers as well as an unlawful taking of property without just compensation. These contentions are discussed in the context of the assistance for high cost areas.

usage levels could also result in significant growth in the interstate allocation if the interstate toll rate reductions accompanying implementation of the access charge plan result in a significant increase in interstate relative use, as expected. This would be contrary to the goal of ensuring a relatively stable interstate allocation.[14] An increased interstate NTS allocation would also result in higher flat fee subscriber access charges since a major portion of the interstate NTS allocation will be recovered directly from subscribers under the access charge plan. For these reasons, continued use of frozen SPF for a substantial number of years or the application of any usage based NTS allocation methodology would produce undesirable results and must be rejected.

11. We agree with the Joint Board's recommendation to set the basic interstate allocation at 25 percent which approximates nationwide average SPF. This will keep the basic division of NTS local exchange costs between the jurisdictions about the same as they are now, and will minimize the aggregate amount of change involved in moving from SPF to a flat allocation. For a further discussion of these matters see the *Second Recommended Decision and Order* at paragraphs 38 through 49.

12. We also agree with the Joint Board's conclusion that a flat 25 percent interstate allocation for NTS local exchange plant costs satisfies the requirements of the Communications Act and the relevant case law concerning the allocation of jointly used telephone plant. Neither the Act nor the relevant case law requires a usage based allocation of this plant. Section 221(c) of the Act authorizes this Commission to allocate telephone company plant between the jurisdictions. This section does not specify a particular allocation methodology, however, allowing the Commission broad discretion consistent with the purposes of the Act.[15] In *Smith v. Illinois Bell*

---

[14] Order Requesting Further Comments, CC Docket No. 80–286, Mimeo No. CC 32408, at para. 35 (released November 15, 1982).

[15] The courts have consistently held that the Commission has broad discretion so long as its actions further the legislative purposes for which the Commission was created and are not contrary to the basic statutory scheme. *See, e.g.*, United States v. Southwestern Cable Co., 392 U.S. 157 (1968) (authorized Commission regulation of cable television although such regulation is not specifically provided for in the Act); National Broadcasting Co. v. United States, 319 U.S. 190 (1943) (sanctioned Commission restriction of network practices found contrary to the public interest despite absence of explicit provision for such regulation in the Act); Lincoln Telephone and Telegraph Co. v. Federal Communications Commission, 659 F.2d 1092 (D.C. Cir. 1981) (upheld Commission establishment of interim billing and collection rate for OCC interconnection with local exchange facilities in the absence of a record sufficient to allow a rate prescription even though this is not specifically provided for in the Act.); Nader v. Federal Communications Commission, 520 F.2d 182 (D.C. Cir. 1975) (approved prescription of a rate of return although the Act specifically authorizes only the prescription of actual rates); G.T.E. Service Corp. v. Federal Communications Commission, 474 F.2d 724 (2d

*Telephone Company*, 282 U.S. 133 (1930), the seminal case on jurisdictional separations, the Supreme Court stated:

> While the difficulty in making an exact apportionment of the property is apparent, and extreme nicety is not required, only reasonable measures being essential, . . . by some practical method the different uses of the property [must] be recognized and the return properly attributable to the intrastate service . . . ascertained accordingly.

*Id.* at 150–51. *Smith* does not require the use of a particular method of allocating costs. The requirement that "by some practical method the different uses of the property [must] be recognized," mandates an allocation of costs between the jurisdictions, but it in no way requires that the allocation be based on minutes of use as New York and California contend. The Court simply concluded that commonly used plant should be apportioned in some manner because it is actually used for both intrastate and interstate services. For a further discussion of this matter see the *Second Recommended Decision and Order* at paragraphs 50 through 52.

13. The *Smith* opinion did not express any preference with respect to apportionment methods apart from noting (fn.4, 282 U.S. at 151) that the prior Court opinion in *Houston v. Southwestern Bell Telephone Co.*, 259 U.S. 318, 332 (1922), accepted the method used in *Houston* as reasonably sufficient upon the facts shown. The local exchange had been credited "with 25% of the long-distance toll revenues received from calls originating in Houston as compensation for the use made of local plant in rendering long distance service." The Houston method did not resemble any method advocated by any opponent of the Joint Board recommendation.

14. Subsequent decisions relating to jurisdictional separations in other industries confirm our view that this Commission has broad discretion in the allocation of jointly used plant. In *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581 (1945), after recognizing that the Congress had prescribed no allocation formula in the Natural Gas Act, the Supreme Court stated:

> When Congress, as here fails to provide a formula for the Commission to follow, courts are not warranted in rejecting the one which the Commission employs unless it plainly contravenes the statutory scheme of regulation. . ..

*Id.* at 589.

15. Later the Court elaborates on this idea in stating:

> Judgment and discretion control both the separation of property and the allocation of costs when it is sought to reduce to its component parts a business which functions as an integrated whole. . ..These circumstances illustrate that considerations of fairness, not mere mathematics, govern the allocation of costs.

---

Cir. 1973) (upheld restriction on carrier entry into the data processing field despite failure of the Act to specifically deal with that question).

*Id.* at 591.

16. MCI's contention that a 25% allocation would be unlawful appears to be a variation of MCI arguments that have been rejected in the past. MCI has frequently argued that prior separations procedures are invalid because the apportionments were not cost-based. In its appeal from our decision adopting the *Interim Cost Allocation Manual* (or "ICAM"), MCI argued that the ICAM should be rejected because it was based in part upon a flawed *Separations Manual*. The Court affirmed this Commission's decision, *MCI Telecommunications Corp. v. FCC*, 675 F.2d 408 (D.C.Cir. 1982). Although the Court of Appeals concluded that MCI's "challenge to the Separations Manual is not relevant," *id.* at 415, that Court also expressed its disagreement with MCI's views. The Court said:

> The very problem at issue here—allocation of common costs—arises precisely because there is no purely economic method of allocation. In this sense no Commission choice among the various methods could be justified solely on economic criteria; elements of fairness and other noneconomic values inevitably enter the analysis of the choice to be made.

*Id.* at 415–16.

17. Finally, we note that with respect to the NTS plant, development of a true "cost based" pricing method would be difficult if not impossible. The Court of Appeals' conclusion in *MCI* that there is "no purely economic method of allocation" is clearly applicable to non-traffic sensitive plant that is used for both interstate and intrastate services. The Joint Board reached essentially the same conclusion when it noted in the *Second Recommended Decision and Order* at para. 52 that a "purely cost based allocation of this plant between the jurisdictions would be extremely difficult to develop since the cost of the plant does not vary with usage." Interjurisdictional subsidy questions cannot arise in the apportionment of commonly used non-traffic sensitive plant or associated expenses because the costs that are attributable to either jurisdiction cannot be identified.

18. We cannot agree with the proposals for federal preemption of state authority over the recovery of NTS local exchange costs put forth by MCI and SBS. Even if we have the power to do so,[16] we

---

[16] In North Carolina Utilities Commission v. Federal Communications Commission (*North Carolina I*) the court stated:

> We have no doubt that the provisions of Section 2(b) deprive the Commission of regulatory power over local services, facilities and disputes that in their nature and effect are separable from and do not substantially affect the conduct or development of interstate communications. But beyond that, we are not persuaded that section 2(b) sanctions any state regulation, formally restrictive only of intrastate communication, that in effect encroaches substantially on the Commission's authority under sections 201 through 205.

cannot find that there is any justification for such an intrusion on the traditional state role in ratemaking at this time. We are in complete agreement with the Joint Board's conclusion that the basic division of NTS local exchange costs between the state and federal jurisdictions should not be changed significantly at this time. There is no justification in the record for changing the level of the interstate NTS allocation in light of the fact that our access charge plan will eventually eliminate the problems previously caused by the high level of toll loading.[17]

19. As previously noted, several parties either suggested delaying Commission action on a new NTS allocation methodology in light of deferral of the effective date for the access charge tariffs[18] or expressed concern about the effect of the flat 25 percent interstate allocation if the Commission's access charge plan is not implemented in its present form. AT&T stated that in the absence of flat fee subscriber access charges, the Commission should institute proceedings looking toward a substantial reduction in the interstate allocation of NTS local exchange costs. The Illinois Commerce Commission also observed that use of this NTS allocation methodology would result in a slight increase in the interstate allocation[19] and, if implemented without flat fee subscriber access charges, would increase the level of inter-regional transfers.[20] We do not believe that suspension of the access charge tariffs or deferral of end user

---

537 F.2d 787 at 793 (1976). Thus, the Commission might have authority to preempt the state regulation of the recovery of intrastate NTS local exchange costs if such regulation effectively thwarted the accomplishment of valid federal regulatory policies. Certainly this is not the case at present. In this regard, it is important to note that the court in *North Carolina I* said that:

> ratemaking typifies those activities of the telephone industry which lend themselves to practical separation of the local from the interstate in such a way that local regulation of one does not interfere with national regulation of the other.

*Id.* at n. 6.

[17] The term "toll loading" refers to the recovery of NTS local exchange costs through the usage charges for interstate message services.

[18] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83–1145, FCC 83–470, released October 19, 1983. In this order the Commission delayed the effective date of the access tariffs from January 1 until April 3, 1984. On January 25, 1984, the Commission voted to defer end user access charges for residential and single line business subscribers until June 1985. Access Charge Proceeding, FCC 84–36, released February 15, 1984.

[19] Although nationwide average frozen SPF is between 26 and 27 percent, use of the basic 25 percent interstate allocation for NTS local exchange costs would result in a slight increase in the interstate NTS allocation when combined with the additional interstate expense allocation for high cost areas.

[20] Illinois' contention is based on the fact that subscribers in certain states originate a very large number of interstate toll calls and, therefore, contribute more through the per minute toll rates to cover the interstate allocation of NTS local exchange costs than is returned to the state through divisions of revenues or settlements.

access charges for residential and single line business users warrants a delay in our final decision with respect to these separations changes. We will, of course, reevaluate these rules if circumstances arise that differ from our present assumptions.

20. Rochester Telephone Co. opposed application of the basic 25 percent interstate allocation factor to inside wiring on the ground that the investment in inside wiring will be fully amortized by 1994 at the latest, and possibly earlier if the Commission grants requests for waiver to allow local telephone companies to complete amortization of this investment as early as January 1, 1987. The possibility that the Commission may grant waivers allowing local telephone companies the option of amortizing the investment in inside wire by 1987 does not justify the continued application of frozen SPF to these investment amounts pending full amortization. Many companies may choose not to accelerate amortization even if the federal and state commissions approve it as an option.[21] Accordingly, we find that the basic 25 percent interstate allocation should apply to inside wiring subject to a transition period beginning January 1, 1986. We are also revising the *Manual* language proposed by the Joint Board to allow direct assignment of inside wire associated with intrastate or interstate private line services. The basic allocation will also apply to drop and block wire[22] which was recently moved from Account 232 to Accounts 242:1, Aerial Cable, and Account 242:3, Buried Cable, effective in the spring of 1984. *Amendment of Part 31*, CC Docket No. 82–679, FCC 83–456, released October 26, 1983.

### III. *Assistance for High Cost Areas*

21. The Joint Board recommended that the Commission adopt two basic measures designed to preserve and promote universal telephone service. The first measure involves an additional interstate expense allocation[23] for study areas with relevant unseparated (*i.e.*, total intrastate and interstate) NTS local exchange plant costs in excess of 115 percent of the national average for these costs. This

---

[21] The 25 percent basic allocation factor will also apply to expenses that are incurred in installing new wiring. These expenses will be removed from regulated operations at some time in the future if the Commission concludes that the installation of new wiring should be deregulated. A final determination with regard to that question has not been made.

[22] The basic 25 percent interstate allocation for NTS local exchange costs is intended to apply to Category 1.33, Subscriber Line Outside Plant, inside wiring, drop and block wiring and Category 8.13 Subscriber Line Circuit Equipment associated with Category 1.33 loop plant as well as the associated maintenance and depreciation expenses.

[23] The expense adjustment achieves essentially the same result as an additional apportionment of NTS investment and related expenses. The Joint Board implemented the high cost factor concept in this manner to provide a more accurate measurement of the total costs that are associated with the relevant NTS plant.

will moderate local exchange rates in high cost areas. The second measure involves dividing the interstate end user common line access charge revenue requirement into a subscriber access charge portion and a high cost portion to cap the subscriber access charge at 200 percent of the national average. Under the Joint Board's recommendation, both the additional interstate expense allocation and the high cost portion of the interstate end user common line revenue requirement would be recovered through carrier's carrier access charges.

22. The level of assistance for each study area would be determined under the Joint Board's proposal by comparing each study area's relevant unseparated cost per working loop with the national average cost per working loop calculated on the basis of information which all study areas will be required to submit to the National Exchange Carrier Association provided for by the Commission's *Access Charge Order*. The additional interstate expense allocation for each study area will be equal to the sum of the following times the number of working loops: (1) fifty percent of the study area's relevant cost per working loop in excess of 115 percent of the national average, but not more than 160 percent of the national average; (2) sixty percent of the study area's relevant cost per working loop in excess of 160 percent of the national average, but not more than 200 percent of the national average; (3) seventy percent of the study area's relevant cost per working loop in excess of 200 percent of the national average, but not greater than 250 percent of the national average; and (4) seventy-five percent of the study area's relevant cost per working loop in excess of 250 percent of the national average. This calculation is performed separately from the allocation of investment, expenses and reserves pursuant to the other provisions of the *Manual*. The amount calculated pursuant to this formula is then subtracted from the intrastate allocation developed pursuant to the other *Manual* provisions and added to the interstate allocation as an additional expense item to be recovered through carrier's carrier access charges under the Commission's access charge plan. By reducing the revenue requirement that a local company is entitled to claim for intrastate ratemaking purposes, the Joint Board's plan would help keep local rates lower than they otherwise would be.[24]

23. The second form of protection for subscribers in high cost areas proposed by the Joint Board involves a division of the interstate end user common line revenue requirement calculated

---

[24] In its Second Recommended Decision and Order, the Joint Board noted that the provisions for assistance to high cost areas may produce anomalous results in the case of certain high growth areas. The Joint Board stated that it intended to study this question and make a supplemental recommendation to the Commission if it found that modification of the provisions for assistance to high cost areas was desirable.

pursuant to Part 69 of the Commission's rules into a subscriber access charge portion and a high cost portion. The amount included in the subscriber access charge portion would eventually be recovered directly from subscribers through flat fee interstate access charges. The high cost portion of the end user revenue requirement would be recovered through carrier's carrier access charges. The division of the interstate end user common line revenue requirement into a subscriber access charge amount and a high cost amount is accomplished by comparing each study area's end user revenue requirement per working loop calculated pursuant to Part 69 of the Commission's rules with the national average for this revenue requirement. Recovering the interstate end user common line revenue requirement in excess of 200 percent of the national average through carrier's carrier access charges would ensure that subscribers in high cost areas do not pay interstate end user access charges that are more than twice the national average.

24. The comments revealed a strong division of opinion concerning the Joint Board's proposals for assistance to high cost areas. A number of parties including AT&T, US West, Pacific Telephone and Telegraph Co., Bell South, United States Telephone Association (formerly USITA), General Telephone and Electronics, United Telephone System and Central Telephone Co. expressed general support for the Universal Service Fund provisions recommended by the Joint Board. While a number of these parties specifically supported directing assistance to high cost areas, many of them suggested that the Commission consider modification of the Joint Board's recommendations to direct assistance to needy individuals. The parties who expressed support for the Joint Board's recommendations in this area also emphasized the need for careful monitoring of the Fund to prevent excessive growth, or expressed concern that recovery of the high cost assistance through interstate toll rates would promote bypass of the local exchange. AT&T recommended capping the Fund at one billion dollars annually. Pacific Telephone suggested recovery of the Universal Service Fund amount through end user charges.

25. A number of parties, including Bell Atlantic, NYNEX, New York Department of Public Service, Vermont Public Service Board, Maine Public Utilities Commission, Illinois Commerce Commission, and Rochester Telephone Company criticized the Joint Board's recommendations as producing an excessively large Universal Service Fund and/or failing to direct assistance to needy individuals who might not otherwise be able to continue telephone service. These parties expressed concern that directing assistance to high cost areas would not effectively promote universal service due to the failure to focus on the ability of subscribers to afford telephone service. Others were critical of the fact that a large amount of assistance would go to high growth areas in the Sun Belt. A number

of these parties also expressed great concern over the interregional transfers which would result from the fact that subscribers in a number of states with relatively low telephone costs and relatively large populations and high levels of business activity would contribute much more to the Universal Service Fund than they would receive in distributions. Several parties also expressed concern that the Joint Board's proposals would undermine efficiency incentives for high cost companies. Bell Atlantic proposed eliminating the Universal Service Fund completely. MCI and SBS opposed the Universal Service Fund, contending that the Joint Board's proposals represent an unlawful tax and an unconstitutional taking without just compensation.

26. A number of other parties, including Southwestern Bell, CP National, Texas Statewide Telephone Cooperative Inc., Independent Alliance, Alaska, Rural Electrification Administration (REA), and Rural Telephone Coalition contend that the Joint Board's proposals will not provide an adequate level of assistance for high cost areas. A number of these parties argued that the point at which high cost assistance begins to apply should be lowered to 110 percent of the national average for relevant NTS costs and that the level of coverage above this point should be increased to 90 or 100 percent.

27. Many of the commenting parties recommended changes in the provisions governing the additional interstate allocation for high cost areas to cover additional categories of plant and related overhead expenses. Most of these parties recommended inclusion of Category 8.13, Subscriber Line Circuit Equipment, and drop and block wire. Several parties advocated inclusion of NTS Category 6 COE, Local Dial Switching Equipment and land, buildings, furniture and other investment related to general overhead. Alaska and REA requested consideration of Universal Service Fund assistance for areas with high traffic sensitive costs.

28. GTE strongly supported the Joint Board's recommendations, but suggested that the Commission advance the date for the first submission of the cost data to be used in calculating the size of the Universal Service Fund (and the amount which each study area would receive) from June 1985 to June 1984. GTE proposed this as a means of allowing the Commission to ensure that the level of assistance provided represents the proper balance between protection for high cost areas and limitation of toll loading to prevent uneconomic bypass of the local exchange.

29. We find that the basic provisions for the protection of universal service recommended by the Joint Board represent a sound balancing of concern for the promotion of universally available telephone service at reasonable rates and the need to prevent uneconomic bypass of the local exchange based on the information presently available. Although the Joint Board's basic recommendations in this area represent the optimal balance based on the existing

record, we recognize that adjustments in the high cost provisions which we are adopting at this time may be necessary. We will be using the high cost data to be filed in June 1984 to further study this matter. We also intend to monitor developments in this area closely and we will make appropriate adjustments if warranted. The filing of high cost data in 1984 and Joint Board monitoring, which are discussed below, will assist us in that effort.

30. We also agree with the Joint Board's plan to direct assistance to high cost areas. This approach will promote universal service by enabling telephone companies and state regulators to establish local exchange service rates in high cost areas that do not greatly exceed nationwide average levels. We recognize that directing assistance to high cost areas will not directly solve the problems of the poor and those living on limited fixed incomes. However, we conclude that providing assistance targeted specifically to these groups is a goal best accomplished through means other than a federally administered program. Programs to assist these groups have traditionally been implemented by the individual states, and we believe that they remain best able to determine and respond to the needs of their citizens. The federal Universal Service Fund will ensure that telephone rates are within the means of the average subscriber in all areas of the country, thus providing a foundation on which the states can build to develop programs tailored to their individual needs.

31. The sliding scale which provides for higher levels of coverage for costs in the upper cost bands is particularly suited to achievement of our dual goals in this area. First, it limits assistance to subscribers in areas with costs close to the national average. Additional assistance in those areas would greatly increase the size of the Fund due to the number of subscribers involved. Second, it provides more assistance to the very high cost areas with the greatest need. The cost of additional coverage in those areas is very modest because only a small number of subscribers are involved.

32. We cannot agree with the parties who argue that the level of assistance provided by the Universal Service Fund should be increased substantially. Measures designed to moderate local telephone rates in high cost areas are desirable, but we believe that the subscribers who receive these benefits should share some of the high cost burden. The cost of housing, electricity and fuel varies substantially from one area of the country to another. The variations in the cost of housing, for example, are quite marked, with equivalent housing costing twice as much in some areas as in others. In light of these variations we see little reason to mandate virtually equal local exchange telephone rates throughout the country[25] by covering all

---

[25] For further discussion of the protection for high cost areas see the Second Recommended Decision and Order at paragraphs 59 through 65.

relevant NTS local exchange costs in excess of 110 or 115 percent of the national average.

33. At least one party has also questioned the efficacy of the Joint Board's proposal for assistance to high cost areas, noting that local companies are not required to use the additional interstate expense allocation to keep local rates lower than they otherwise would be, although the Joint Board has stated that this is the intended purpose of the additional interstate allocation. We believe that the interest of state regulatory officials in keeping local rates affordable as well as the watchfulness of individual consumers and local consumer groups will ensure that this assistance is used for its intended purpose. Several of the state members of the Joint Board have stated that the state Commissions would take steps to ensure that this assistance was used to keep local rates lower than they would otherwise be. Furthermore, we are asking the Joint Board to monitor the future use of this assistance. In particular, we are asking the Joint Board to be alert for possible abuses in this area during the course of its monitoring efforts, and to inform us if there is evidence that this assistance is not being used for its intended purpose. Widespread use of the high cost assistance to subsidize the cost of business services, or intrastate toll, for example, could lead us to reexamine the need for the Universal Service Fund.

34. Contrary to the contentions of MCI and SBS, we believe that the apportionment of high cost or universal service factor costs is within our discretion under the Communications Act and the relevant case law. The Joint Board's high cost factor recommendation does, of course, differ from the base factor recommendation in that the non-cost criteria are not neutral with respect to the rate impact upon users of different services. The high cost factor was expressly designed to enable telephone companies and state commissions to establish local exchange service rates in high cost areas that do not substantially exceed nationwide average local exchange service rates. That decision is entirely proper in view of our conclusion in the *Access Charge Order, supra* note 12, that universal service is one of the goals of the Communications Act. On the contrary, we could not *fulfill* our obligations under the Act if we did not consider possible effects upon universal service in adopting rules for the apportionment of commonly used non-traffic sensitive plant.

35. MCI also asserts that the high cost factor apportionment is a tax upon interstate carriers or users of interstate services or a taking of the property of such carriers or users. We do not believe that these claims have any merit. The provisions recommended by the Joint Board do not apportion any costs to services that do not use the non-traffic sensitive plant in question. All of the costs that are included in the computation of the expense adjustment are attributable to lines that are commonly used for a variety of interstate or intrastate services. Therefore, an apportionment of these costs to interstate

services does not subject interstate services to any charge for facilities that such services do not use. Accordingly, this apportionment cannot be characterized as a tax upon interstate services or a taking of the property of interstate carriers or their customers. None of the cases cited by MCI hold or even suggest that such a jurisdictional apportionment of common costs could be described as a tax or a taking.

36. While the basic structure of the Universal Service Fund recommended by the Joint Board is sound based on the record before us at this time, we have decided that the method of calculating the high cost assistance should be modified slightly.[26] Under the approach recommended by the Joint Board, the costs considered in determining eligibility for the additional interstate expense allocation as well as the level of assistance for eligible study areas include: (1) a return component or revenue requirement for net Outside Subscriber Plant (OSP) Category 1.33 plant investment, which includes non-wideband loops between local central offices and subscriber premises jointly used for exchange service and toll message services excluding WATS access lines; (2) maintenance and depreciation expenses associated with this OSP Category 1.33 plant; and (3) a portion of general expenses, certain other expenses and taxes proportionate to this net OSP Category 1.33 investment as a percentage of total net telephone plant investment. The return component for this net OSP Category 1.33 investment is calculated using the actual debt/equity ratio for each study area, the actual cost of debt and the authorized interstate rate of return on equity.

37. As previously mentioned, a number of parties suggested expansion of the plant categories covered by the high cost assistance. We have decided to expand these plant categories to include outside or drop wire and Category 8.13, Subscriber Line Circuit Equipment[27] associated with jointly used non-wideband subscriber loops. Inclusion of these plant categories was supported by most of the parties addressing this question. The emphasized that the length and the cost of outside or drop wire can vary greatly between rural and urban areas.[28] Consequently, the greater formula. Such questions

---

[26] *See* paragraph 29 supra.

[27] Circuit equipment includes:

> central office equipment other than switching equipment, which is used to derive communications transmission channels or which is used for the amplification, modulation, regeneration, testing, balancing or control of signals transmitted over communications transmission channels.

Separations Manual, Paragraph 24.01 (now § 67.140(a)).

[28] Inclusion of drop lines and Subscriber Line Circuit Equipment in the high cost calculations will also make those calculations more consistent with the computation of the common line revenue requirement for purposes of the access charge rules.

may, of course, be considered in subsequent proceedings to examine traffic sensitive separations. To facilitate and expedite study of these questions we are asking each telephone company study area to report data on its NTS and TS Category 6 COE costs to the NECA in June 1984 along with the other data related to calculation of the amount of high cost assistance.[29]

39. As previously mentioned, GTE recommended that local telephone companies submit the data related to calculation of the additional interstate allocation to the National Exchange Carrier Association (NECA) in June 1984 rather than 1985. All of the parties who commented on this subject supported GTE's proposal. We agree that the high cost data should be filed for the first time in June 1984, although the additional interstate allocation will not begin to be implemented until 1986. The telephone companies should file 1983 data even though they may not be able to provide data for that year which is precise enough for the calculation of actual high cost distributions. This information should provide a much clearer picture of the size and distribution of the Fund. Filing cost data in 1984 will impose some additional administrative burdens on local telephone companies, but we conclude that the additional work load is justified. Submission of this data in 1984 will allow us to review the effects of the Universal Service Fund formula and make any necessary adjustments before the transition period begins. This is particularly important in light of our decision to expand the plant categories covered by the additional interstate expense allocation. At its November 30, 1983 meeting, the Joint Board recommended that the Commission move the date for filing the high cost data up to June 1984. The Joint Board stated that it intended to use this data to examine the results produced by the high cost provisions, including the level of assistance to high growth areas and stated that it would issue supplemental recommendations if adjustments were desirable.[30] We endorse this approach by the Joint Board.

40. The Joint Board also recommended use of each company's actual debt/equity ratio and cost of debt in calculating the additional interstate expense allocation for high cost areas.[31] It proposed use of the authorized interstate rate of return on equity of 17.5 percent as the cost of equity. This is the AT&T authorized return on equity. The

---

[29] In particular, each telephone company study area should submit the information specified in Paragraph 62.11 (now § 67.611(a)) for OSP 1.33 for both NTS and TS category 6 COE with the relevant amounts for each stated separately.

[30] In the Second Recommended Decision and Order, the Joint Board stated that it intended to study this matter and would issue a supplemental recommendation if necessary.

[31] Pursuant to the Joint Board's recommendations, the actual debt/equity ratio and cost of debt would be used in calculating the return component or revenue requirement for the relevant NTS plant categories. This return component is added to the relevant expenses to determine the additional interstate expense allocation for each study area.

Joint Board stated that these measures were necessary in order to direct support to areas which actually had high costs since there are wide variations in the cost of debt. Some study areas have an embedded cost of debt below 5 percent while others have a much higher cost of debt reflecting the interest rates in recent years. REA and most of the organizations representing small independent telephone companies strongly opposed this provision. They argued that use of the actual cost of debt would deprive REA borrowers of the benefits of the below market rate loans offered by REA to foster the development of telephone service in rural areas. These parties also argued that imputing the authorized AT&T interstate rate of return on equity to their operations was inappropriate, taking the position that the Commission would be required to prescribe an actual rate of return on equity for each company if it used the actual cost of debt.

41. Based on the record currently before us in this proceeding we are adopting the Joint Board's recommendations for the computation of the return component. Due to the importance of this question, we are also asking the Joint Board to study this area further and prepare additional recommendations if appropriate. Based on the current record, it does not appear that use of the actual capital structure and embedded cost of debt will deprive REA borrowers of the intended benefits of the low interest rate loan program. An REA loan will still decrease the cost of providing service, allowing local rates which are lower than they would be if the plant had been financed through a loan at prevailing market interest rates. The Joint Board's proposal simply means that the fact that a company is already benefitting from a low interest rate loan will be taken into account in determining the level of support to be provided through a second assistance mechanism. Failure to consider this would result in a disproportionate amount of assistance to areas with low capital costs. We do not believe that a determination of the actual cost of equity for each company is necessary if the actual capital structure and cost of debt are used in determining the additional interstate expense allocation. As a general matter, the cost of equity is higher for companies with a very high proportion of debt financing as is the case with many small independent telephone companies. However, the AT&T authorized interstate rate of return on equity of 17.5 percent appears to be entirely adequate for small independent telephone companies under today's economic conditions.[32] Despite this, some adjustment might be appropriate if the return on equity were to be reduced significantly in future Commission proceedings.

42. We recognize that the cost of capital used in determining the additional interstate expense allocation is different from that used in

---

[32] Prescribing a cost of equity for each local telephone company is not feasible since there are approximately 1500 different local companies.

calculating access charges under Part 69 of the Commission's rules which mandated use of the AT&T authorized interstate rate of return (12.75 percent) for the present. *Access Charge Order*, FCC No. 82–579, at paras. 252–254. We believe that the possible administrative burdens involved in using different costs of capital for these two calculations is more than offset by the benefits of directing the high cost assistance to the areas with the greatest need. However, we are revising the *Manual* language recommended by the Joint Board to specify that the rate of return on equity to be used in calculating the additional interstate expense allocation is the rate of return on equity prescribed for use in calculating interstate access charges. Clarification is necessary because an interstate rate of return for access service may be prescribed at some future date that differs from the authorized return for AT&T.

43. We believe that the Joint Board's recommendations concerning the cost of capital to be used in calculating the high cost assistance are justified on the basis of the present record and we are adopting these recommendations. However, we are asking the Joint Board to study this area further and prepare additional recommendations if appropriate.

44. The Joint Board recommended that a portion of the end user common line revenue requirement also be included in the Universal Service Fund that will be recovered through carrier common line access charges. This access charge cap would be implemented through division of the end user common line revenue requirement, calculated pursuant to Part 69 of the Commission's rules, into a subscriber access charge amount (which will be recovered from subscribers through flat fee access charges) and a high cost amount to be recovered through the Universal Service Fund. We agree with the Joint Board's conclusion that it is essential to impose a cap on the end user charges that will be paid by subscribers pursuant to Part 69 of our rules. Such a provision is necessary to ensure reasonable subscriber access charges in high cost areas. The flat 25 percent interstate allocation for NTS local exchange costs will result in an interstate allocation that is a function of the cost of service. Thus, a study area with NTS costs that are four times the national average would have a correspondingly high interstate allocation. If this NTS allocation were recovered solely through subscriber access charges, it could have a significant adverse effect on telephone subscribers.

45. MCI argues that the Commission cannot adopt a subscriber access charge cap which as a practical matter amends Part 69 of the rules in the context of this proceeding. We find that there is merit to MCI's contention that this provision should be contained in Part 69 of the rules rather than the *Separations Manual*. The procedures for computing the cap adjustment would not have any effect on the

computation of the intrastate revenue requirement and should not be described as a jurisdictional separations rule.

46. In order to avoid any possibility of procedural irregularity we have decided not to adopt the access charge cap recommended by the Joint Board in this proceeding. Instead, we will issue a *Notice of Proposed Rulemaking* in the near future inviting comments on proposed amendments to the access charge rules which will reflect the substance of the Joint Board plan for an access charge cap. This delay will not prejudice consumers.

47. We view this decision as a matter of "housekeeping detail", and it should not be viewed as undermining our conclusion that an access charge cap such as that recommended by the Joint Board is integral to the successful implementation of access charges. Such an approach will also be more consistent with the division of authority between the state and federal jurisdictions under which changes in the jurisdictional separations procedures require the preparation of a recommended decision by a Federal-State Joint Board pursuant to Section 410(c) of the Communications Act, while the determination of the manner in which costs allocated to the interstate jurisdiction are to be recovered is not subject to this requirement.[33]

48. In its *Second Recommended Decision*, the Joint Board recommended that the Commission extend the the Joint Board's mandate to include monitoring the implementation of access charges and the proposed separations changes. We are very much aware of the need to monitor developments in this area so that we can make appropriate adjustments in a timely fashion should this be necessary. We conclude that the experience and expertise which the Joint Board has developed during the course of this proceeding will be a valuable aid to the Commission's monitoring efforts in this area. Their involvement will help ensure that any possible problems in terms of subscriber discontinuance or accelerating rates of bypass will be brought to our attention in their early stages so that timely adjustments can be made. Accordingly, we are accepting the Joint Board's offer to assist us in our monitoring efforts related to access charges and separations. We are developing an access charge monitoring plan in Phase IV of the *Access Charge Proceeding*, and we will provide further specifics concerning the Joint Board's role in access charge monitoring in the context of that proceeding. Of course, we would welcome proposals from the Joint Board concerning its role in monitoring the implementation of access charges. We are also asking the Joint Board to prepare proposals for monitoring

---

[33] While we endorse the Joint Board's recommendation that the additional interstate expense allocation and the high cost portion of the end user access charge be recovered through the usage based carrier's carrier charges, a change in this method of recovering the Universal Service Fund revenue requirement would not require a Joint Board recommendation since it does not involve the allocation of costs between the jurisdictions.

implementation of the separations charges we are adopting in this *Decision*.

## IV. *Transition*

49. The Joint Board recommended a gradual transition from the present SPF based system of NTS local exchange cost allocations to the new system based on the flat 25 percent interstate allocation for all study areas combined with an additional interstate allocation for high cost areas. The Joint Board proposed continuing the use of frozen percentage SPF[34] during 1984 and 1985 followed by a four step transition to the new 25 percent interstate allocation. The high cost additive would also be implemented in four equal steps. The Joint Board also recommended limiting to ten percentage points the total annual decrease for any study area in the interstate allocation for Category 1.33 and inside wire after the high cost additive is taken into account.[35]

50. The parties who addressed the transition question expressed almost unanimous support for continued use of SPF during 1984 and 1985. We find that this approach is desirable because it will eliminate the need for telephone companies to begin implementing major changes in separations during the first two years of the access charge transition. Implementing the other more immediate separations changes will require significant efforts on the part of local telephone companies, and we do not believe that we should increase this burden by instituting the transition to the new NTS allocation methodology immediately.

51. Although SNET, Bell South and Southwestern Bell supported the entire transition plan, several parties, including the Independent Alliance[36] and the New York Department of Public Service proposed extending the transition period. Vermont also proposed an alternate transition plan to cushion the effect on high SPF/low cost areas. It is true that some study areas with high SPFs and average or low costs will experience substantial increases in their intrastate revenue requirements as a result of the new NTS allocation methodology. Despite this, we agree with the Joint Board's conclusion that a four step transition is adequate to avoid undue hardships when combined with the ten percentage point limitation on the

---

[34] The Joint Board recommended continued use of each study area's existing frozen percentage SPF. We agree that SPF should not be recalculated to reflect changes such as the adoption of seven day traffic studies or the recognition of interstate FX/CCSA open end usage when we are moving toward an equal percentage interstate allocation for all areas independent of usage.

[35] The Joint Board recommended that the high cost assistance be implemented in four steps even if the study area involved qualified for an extended transition to the 25 percent interstate allocation. We agree with this approach.

[36] The Independent Alliance is composed of the Roseville Telephone Company, Northern States Power, and Anchorage Telephone Utility.

annual reduction in each study area's NTS allocation. The only companies that will experience major decreases in their interstate allocations are average or low cost companies with high SPFs. These companies receive disproportionately large benefits under the present separations system because they allocate an unusually high percentage of their NTS local exchange costs to the interstate jurisdiction. Telephone companies in these circumstances have often been able to maintain very low local exchange rates under the present system. Even when the new separations system is fully implemented, such companies should have average local rate levels because they have average or below average costs. While high SPF/low cost companies need some time to adjust to the changes resulting from the new allocation methodology, there is no need to further extend the proposed transition period for them in light of the fact that the end result will only be a movement from unusually low local rates to charges that are closer to the national average. We find, however, that certain minor modifications should be made in the way that the 10 percentage point reduction cap is calculated. Accordingly, we are including OSP Category 1.33, and inside wire, drop and block wire and Category 8.13 Subscriber Line Circuit Equipment associated with OSP Category 1.33 as well as associated maintenance and depreciation in this calculation.

## V. *Other Changes*

52. The Joint Board also recommended changes in a number of additional areas.[37] The recommendations which received the most attention from commenting parties involved: (1) the treatment of ENFIA usage; (2) the recognition of interstate open end FX/CCSA/ONALS usage in allocating traffic sensitive Category 6 COE; (3) the direct assignment of closed end WATS access lines; (4) the separations treatment of Centrex/CO facilities; (5) the separations treatment of revenue accounting and business relations expenses related to access charges; (6) the definition of outside plant categories; (7) the development of traffic study methodologies; (8) the establishment of a separations data bank; (9) the treatment of both NTS and TS Category 6 COE; and (10) the appropriate effective date for these changes. Each of these matters is discussed below.

53. *ENFIA Usage*. The Joint Board proposed revisions to the *Separations Manual* designed to recognize usage of local exchange plant by competitive message services provided by interexchange carriers other than AT&T (referred to as ENFIA usage). The Joint Board concluded that changes to reflect outside plant usage by competitive message services would not be necessary in light of its recommendation of a fixed percentage interstate allocation for commonly used subscriber lines and the present *Separations Manual*

---

[37] These changes are described in paragraph 4, *supra*.

description of OSP Category 1.2 as including toll connecting facilities. It interpreted the description of OSP Category 1.2 as covering transport facilities for all interexchange carriers. The Joint Board also recommended recognizing usage by competitive message services in the allocation of traffic sensitive Category 6 COE costs, without application of a weighting factor for interstate use by these services.

54. The comments revealed a division of opinion concerning the treatment of competitive message service use of TS Category 6 COE. AT&T and GTE supported the unweighted treatment of traffic sensitive Category 6 COE usage by existing competitive message services, but GTE said that equal access trunk usage should be subject to weighting factors. SBS and GTE Sprint also support this approach. Several other parties including Southwestern Bell, United States Telephone Association, and United Telephone System supported application of a weighting factor to ENFIA B and/or C usage because it involves a trunk side connection.[38] USTA and GTE also contended that the voice grade central office connecting facilities (VGCOCFs) used by the OCCs in the provision of their interstate services should be treated as loop rather than trunk plant. We agree with the Joint Board's recommendation that existing competitive message service use of traffic sensitive Category 6 COE be unweighted. ENFIA B and C do involve trunk side connections, but these connections are still not the equivalent of the trunk side connections received by AT&T. ENFIA B and C usage also constitutes a very small percentage of all competitive message service use, and with the availability of equal access in the near future there is no reason to expect substantial growth in the usage of ENFIA B and C. As a result, we conclude that calculating ENFIA B and C usage and developing proper weighting factors for them[39] would require more administrative effort than is justified by the small increase in the precision of the allocation of TS Category 6 COE costs. However, we agree with GTE that the weighting factor applied to MTS and WATS use of traffic sensitive Category 6 COE should be applied to the use of such equipment by competitive message services employing equal access trunks.

55. We also agree with the Joint Board's conclusion that the VGOCFs used by the OCCs should be treated as local exchange trunk plant for separations purposes since this treatment is necessary for consistency with the Commission's access charge rules. The access

---

[38] For a discussion of ENFIA A, B, and C services see the *Order Requesting Further Comments*, CC Docket No. 80-286, Mimeo No. CC 32408, at pages 47-48, released on November 15, 1982.

[39] Developing proper weighting factors would be particularly difficult in the case of ENFIA B which allows the OCC the choice of a number of optional services to go with the trunk side connection and, therefore, could require the development of a number of weighting factors.

charges rules establish a dichotomy between trunks that are classified as "transport" and lines to end user premises that are included in the "common line" element.

56. *FX/CCSA/ONALs Service*. The Joint Board recommended allocating all traffic sensitive plant costs, expenses, and revenues attributable to interstate FX/CCSA/ONALS[40] open end access services to the interstate jurisdiction. The Joint Board also concluded that no toll weighting factor would be applied to interstate FX/CCSA/ONALS use of central office equipment. Few of the parties filing comments addressed the Joint Board's proposals for the treatment of interstate FX/CCSA/ONALS service, although CP National, Southwestern Bell and National Data stated that they supported this treatment of FX/CCSA/ONALs service. GTE, Centel and Pacific asked the Commission to clarify that the term "ONALs" or Off Network Access Line Service includes LONALs or Local Off Network Access Line Service. We believe the language the Joint Board has chosen is sufficiently broad to include all forms of open end access for FX, CCSA and similar services.

57. USTA, GTE, United, Centel, Pacific Telephone and National Data urged the Commission to provide for the direct assignment of the closed ends of FX and CCSA access lines to the appropriate jurisdiction. The rules proposed by the Joint Board do assign all private lines including FX and CCSA closed end loops directly to the intrastate or interstate jurisdiction.

58. ARINC did not oppose the Joint Board's recommendations concerning the treatment of FX/CCSA/ONALS, but urged establishment of a five year transition period for implementation of these changes to prevent rate shock for the users of these services. ARINC estimated that adoption of the Joint Board's recommendations would result in rate increases for FX/CCSA/ONALs service of approximately $56 million for the airline industry in 1984. MCI opposed a transition period for implementation of the FX/CCSA/ONALs charges.

59. ARINC's complaint appears to be directed to the treatment of FX and CCSA open end access in the access charge rules rather than separations changes which merely reflect the jurisdictional status of these services. The access charge rules were designed to remedy the longstanding discrimination between FX and MTS users. Indeed, this was one of the central purposes of the *Access Charge Proceeding*. Any adverse effect upon FX users has, of course, long been anticipated. We described a plan to establish parity between FX and MTS users in the *Second Supplemental Notice* in CC Docket No. 78–72, 77 FCC 2d 224 (1980). The final access change rules which we

---

[40] For a description of these services see the *Order Requesting Comments* CC Docket No. 80–286, Mimeo No. CC 32408, at page 39, released November 15, 1982.

adopted in December 1982 accomplished that purpose in a somewhat different way.[41] A transition would not be warranted under these circumstances.

60. *WATS Closed End Access Lines*. The Joint Board recommended direct assignment of WATS closed end access lines to the appropriate jurisdiction, rather than allocation of the relevant costs between the jurisdictions. SBS opposes direct assignment of WATS access lines. MCI also criticizes the direct assignment of WATS access lines. GTE Sprint supports direct assignment of WATS access lines, but recommends that this treatment be phased in to coincide with the implementation of equal access for the OCCs. SBS and MCI also urged that any provision for direct assignment of WATS access lines be phased in over the same period that equal access is implemented. They contend that direct assignment of WATS access lines would substantially decrease the costs associated with WATS and give AT&T a substantial competitive advantage since the OCCs cannot offer WATS on an economically viable basis without equal access. United and National Data opposed phasing in the direct assignment of WATS.

61. We believe that, in principle, direct assignment of closed ends WATS access lines is the most rational method of allocating these costs. However, we believe that the questions raised by the OCCs concerning possible distortions in the competitive marketplace which could result from the direct assignment of WATS access lines warrant deferral of Commission action on this proposal. We believe that there is a need for further study of the impact of such treatment and consideration of whether any other regulatory changes are necessary to accomodate this modification of the historical treatment of WATS closed ends. Accordingly, we will retain the existing separations treatment of WATS access lines for the present and refer this question to the Joint Board for consideration of the questions raised by the OCCs.

62. *Centrex/CO Service*. Although the Joint Board did not recommend any separations changes related to the allocation of local loops used for Centrex/CO services, several parties addressed this matter in their comments.[42] Southwestern Bell urged use of PBX trunk equivalency ratios[43] in counting Centrex lines. Ameritech also

---

[41] The original plan included a complex adjustment to reflect local exchange business rate or B-1 billings for FX/CCSA access service. The final plan eliminated that adjustment because we assumed that separations rules recognizing the interstate status of interstate FX would be in place by the time the access charge tariffs became effective.

[42] In the *Access Charge Reconsideration Order* at para. 49, the Commission stated that the Joint Board should examine the effects of access charges for Centrex/CO lines in the context of its monitoring activities.

[43] Large organizations can satisfy their need for access to the public switched network and access to different telephone stations within their own premises by subscribing to Centrex/CO service or by leasing or purchasing a PBX or Private

presented a proposal for allocation of Centrex/CO lines using PBX trunk equivalency ratios. NYNEX took the position that Centrex/CO separations changes are premature. NYNEX said that access charges will undermine the viability of Centrex/CO service, but stated that the proposed separations changes would have significant local rate effects. It urged study of this matter by the Joint Board before any changes are adopted. GTE Sprint opposes the Centrex/CO separations proposals, arguing that they are essentially an untimely attempt to evade access charges. The North American Telephone Association (NATA) also urged rejection of the proposed separations changes for Centrex/CO services.

63. We agree with the parties who have concluded that these proposals are untimely. Changes in the separations treatment of Centrex lines have never been considered by the Joint Board. The Joint Board may consider such recommendations in connection with its monitoring activities and may submit a supplemental recommendation if it concludes that a change is warranted.

64. *Revenue Accounting Expense*. The Joint Board rejected an AT&T proposal to revise the apportionment of revenue accounting expenses because the AT&T proposal would not be consistent with this Commission's access charge rules. (*Recommended Decision*, para. 112). However, the AT&T comments which included that proposal were prepared before we adopted the access charge rules.

65. GTE noted that the existing *Separations Manual* provisions that would be retained under the *Recommended Decision* are also inconsistent with the access charge rules in that Part 6 of Section 4 does not contain any category for access charge billing expenses. GTE suggested that this be remedied by creating two new categories of revenue accounting expense for end user access charge billing expense and carrier access charge billing expense. It proposed that each category be apportioned equally between intrastate and interstate operations in states that adopt that category of access charges and that all of the expense be assigned to interstate operations in states that do not adopt that category of access charges. Similar proposals have been advanced in the comments of USITA, United Telephone System and Centel.

66. None of the reply comments have expressed opposition to the GTE proposal for the apportionment by access charge billing expense. Therefore, we have decided to adopt that proposal with one modification. The revised access charge rules permit end users or interexchange carriers to order special access facilities and the charges and associated surcharges will be assessed to the end user if

---

Branch Exchange. In the case of Centrex/CO service each telephone has a line to the central office and intercom switching is performed at the central office. If there is a PBX, each telephone is connected to the PBX and there are a limited number of lines between the PBX and the central office. Intercom switching is performed at the PBX.

the end user elects to order the facility directly. The revised Section 69.406 of the access charge rules establishes two categories for purposes of apportioning revenue accounting expense that is attributable to access charge billings—expenses attributable to end user common line billings and expenses attributable to all other access charge billings. Special access and special access surcharge billings to carriers or end users are included in the second category. We have decided to adopt the same two categories for separations purposes.

67. *Outside Plant Categories*. The Joint Board recommended a number of minor changes in the Outside Plant Categories.[44] Except for the creation of a new Category 3 for host-remote complexes, the Joint Board made no significant changes in the two major categories of outside plant—Category 1 exchange plant and Category 2 interexchange plant—because it concluded that the existing categories basically corresponded with the local access and interexchange categories in the access charge plan. The Joint Board recommended some minor revisions in the exchange category to achieve greater consistency with the access charge plan. It proposed revising Category 1.1 to include only wideband loops. Under its proposals Category 1.2 would include both wideband and non-wideband trunks and Category 1.3 would include non-wideband loops. Centel argues that existing definitions of exchange and interexchange outside plant (Categories 1 and 2) do not correspond precisely with the access/interexchange dichotomy in the access charge rules. The Joint Board's *Second Recommended Decision* does not alter those definitions apart from the creation of a new category for host/remote plant, and we do not believe that the record is adequate to permit us to adopt refinements in the definitions at this time.

68. U.S. West requests that the *Manual* language concerning the allocation of wideband message facilities be amended to delete the requirement that these facilities be apportioned based on the type of wideband facility involved. It states that this plant is presently apportioned on the basis of the usage for each service, and that the proposed change would result in major record keeping and usage measurement problems. We agree that the existing allocation methodology should be continued.

69. GTE recommends expanding the four proposed subcategories of subscriber outside plant to seven in order to make separations changes more consistent with the access charge rules. We are not adopting this proposal because we conclude that additional subscriber outside plant categories are not necessary for consistency with the access charge rules.

70. *Seven (Calendar) Day Traffic Studies*. The Joint Board

---

[44] A number of these proposals such as the direct assignment of WATS access lines and the treatment of VGCOCFs used by the OCCs as local exchange trunks rather than subscriber loops, are discussed elsewhere in this section.

recommended that all companies (which use cost based separations procedures) be required to use seven (calendar) day studies as the basis for separations usage measurements. It recommended accomplishing this by providing that traffic studies must cover a representative period "for all traffic." The *Manual* had previously required only the use of a representative period. The Rural Telephone Coalition objects to the change in *Separations Manual* language because it believes this change will prejudice claims that the present *Manual* requires seven day studies. The Chief, Common Carrier Bureau addressed the interpretation question under the present *Manual* in *Reservation Telephone Cooperative*, and concluded that the present *Manual* does not specify a particular study period.[45] We agree with the Joint Board's recommendation that seven (calendar) day studies be used as the basis for separations usage measurements. We conclude that the recommended change in the *Manual* language should be adopted to accomplish this change.

71. *Separations Data Bank and Technical Staff*. Some of the parties have renewed proposals to create a technical staff and an information bank. The Joint Board concluded that the technical staff proposal was not desirable and that the information bank proposal should be considered outside of the context of this proceeding. *See* paras. 108–111 of the *Second Recommended Decision*. We agree with the Joint Board's conclusions in this regard. It may well be desirable to facilitate greater public scrutiny of the separations process, but additional study is needed before adoption of specific measures to accomplish this. Since this question does not involve the separation of costs, it can be studied outside of the Joint Board process. We agree that the creation of a technical staff could create additional delay.

72. *Category 6 COE and Peak Period Traffic Studies*. Several parties have proposed additional changes in the apportionment of Category 6 Central Office Equipment and other traffic sensitive plant which can and should be considered in the traffic sensitive separations proceeding. For example, AT&T proposes the elimination of the NTS subcategory within Category 6, while GTE Sprint and others advocate the use of peak/offpeak usage measurements. The record that has been developed in this proceeding is not adequate to enable us to make such changes at this time. We do, however, view these subjects as open questions which warrant further study.

73. One traffic sensitive question that has been raised in these comments appears to warrant consideration prior to the completion of any comprehensive reexamination of traffic sensitive separations. Southwestern Bell has recommended the creation of a separation

---

[45] Mimeo No. 2037, released July 17, 1981. An application for review of this ruling is pending.

category for costs that will be incurred to provide equal access to all interexchange carriers. It claims that the application of the existing formula could result in the inclusion of some of these costs in local exchange rates. It would not be proper for us to adopt changes at this time because this question has never been considered by a Joint Board. We have concluded, however, that this Joint Board should be asked to examine this question and to submit a recommendation to us. Inasmuch as the divested Bell Operating Companies will be incurring such costs in the near future, we encourage the Joint Board to give this question priority consideration.

74. *Miscellaneous*. AT&T proposed a number of specific changes in the technical proposals made by the Joint Board. It recommended modifying *Manual* Paragraph 24.131 (now § 67.131(c)(1)) to specify that direct assignments of power equipment, not dependant on common power equipment, be excluded from consideration in determining the distribution of the cost of common power equipment among the categories. It recommended modification of Paragraph 11.251 (now § 67.2(e)(1)) to specify that indirect costs associated with CPE (expenses, taxes, and reserves) will continue to be phased out as is now the case. AT&T proposed the addition of a new Paragraph 42.327 to segregate WATS access testing expenses from those for private line services, and allocate them on the basis of the relative number of working WATS access loops providing state and interstate service. AT&T also recommended modification of Paragraph 49.31 (now § 67.413(a)) concerning the allocation of property taxes to clarify that a study area approach is acceptable rather than case-by-case cost studies. In addition, AT&T suggested revision of Paragraph 11.26 (now § 67.2(f)) to specify that it was intended to pertain to billed costs. With the exception of the proposal for the segregation of WATS access testing expenses, we conclude that these proposals represent clarifications or improvements on the existing provisions and we adopt them. We will not approve the segregation of WATS access testing because the record in this proceeding does not establish a need for this change.

75. *Effective Date*. The Joint Board recommended that the proposed separations changes other than the basic allocation factor and the assistance for high cost areas be effective January 1, 1984, the same date as the access charge tariffs. We agree with the Joint Board's conclusion that these changes should be effective at the same time as the access charge tariffs. That date is now April 3, 1984 unless the issues raised by the access charge and related tariff filings are resolved prior to that date.

76. *Regulatory Flexibility Certification*. We certify that the Regulatory Flexibility Act is not applicable to the rules we are adopting in this proceeding. Although some local exchange carriers are very small, local telephone companies do not appear to fall within the Regulatory Flexibility Act's definition of a "small entity."

The Act incorporates the definition of a "small business" in Section 3 of the Small Business Act as a definition of a "small entity." The latter definition excludes any business that is dominant in its field of operation. Exchange carriers, even small ones, enjoy a dominant monopoly position in their local service area. This Commission has found all exchange carriers to be dominant in the *Competitive Carrier Rulemaking*, 85 FCC 1, 23–24 (1980). To the extent that interexchange carriers may be affected by these rules, we hereby certify that these rules will not have a significant economic effect on a substantial number of small entities.

## V. *Ordering Clauses*

77. Accordingly, IT IS ORDERED, That the recommendations of the Federal-State Joint Board, as modified herein, are ADOPTED pursuant to Sections 1, 4(i), 4(j), 221(c), and 410(c) of the Act, 47 U.S.C. §§ 151, 154(i), 154(j), 221(c) and 410(c) (1976).

78. IT IS FURTHER ORDERED, That except as provided in Attachment B of this *Decision and Order*, the amendments to the *Separations Manual*, set forth in Appendix A of the *Second Recommended Decision and Order* of the Federal-State Joint Board ARE ADOPTED effective April 3, 1984.

79. IT IS FURTHER ORDERED, That the amendments to the *Separations Manual* set forth in Attachment B of this *Decision and Order* ARE ADOPTED effective April 3, 1984.[46]

80. IT IS FURTHER ORDERED, That the provisions of the *Separations Manual*, as modified herein, ARE hereby CODIFIED[47] as set forth in Attachment A of this *Decision and Order*.

81. IT IS FURTHER ORDERED, That the Motions for Leave to File Late Comments filed by the Vermont Public Service Board and the Northern American Telephone Association ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

---

[46] The Joint Board's Second Recommended Decision and Order was submitted to the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act. OMB did not comment on the Joint Board's Recommendations.

[47] The *Separations Manual* has been incorporated by reference in Part 67 of our rules. We are codifying the *Manual* and publishing the full text in our rules at the request of the Office of the Federal Register.

## *ATTACHMENT A*

**47 C.F.R. is amended by revising Part 67 to read as follows:**

## PART 67—JURISDICTIONAL SEPARATIONS PROCEDURES

**Standard Procedures for Separating Telephone Property Costs, Revenues, Expenses, Taxes and Reserves.**[1]

### Subpart A - General

### GENERAL

**Sec.**

**67.1 General**

**67.2 Fundamental Principles Underlying Procedures**

### Subpart B—Telephone Property

### GENERAL

**67.101 Section Arrangement**

**67.102 General**

### LAND AND BUILDINGS

**67.111 General**

**67.112 Land**

**67.113 Buildings**

### OUTSIDE PLANT

**67.121 General**

**67.122 Categories of Outside Plant**

**67.123 Assignment of Outside Plant to Categories**

**67.124 Exchange Outside Plant Categories and Appointment Procedures**

**67.125 Interexchange Outside Plant Categories and Appointment Procedures**

**67.126 Host/Remote Message Outside Plant Category and Apportionment Procedures**

### CENTRAL OFFICE EQUIPMENT

**67.131 General**

**67.132 Categories and Apportionment Procedures**

**67.133 Manual Telephone Switching Equipment - Category 1**

**67.134 Dial Tandem Switching Equipment - Category 2**

**67.135 Intertoll Dial Switching Equipment - Category 3**

---

[1] The Commission has determined that the same jurisdictional separations procedures used in the contiguous states are to be used for Alaska, Hawaii, Puerto Rico and the Virgin Islands. *Integration of Rates and Services*, Docket No. 21263, 87 FCC 2d 18 (1981); *Integration of Rates and Services*, Docket No. 21264, 72 FCC 2d 699 (1979).

**67.136 Automatic Message Recording Equipment - Category 4**

**67.137 Other Toll Dial Switching Equipment - Category 5**

**67.138 Local Dial Switching Equipment - Category 6**

**67.139 Special Services Switching Equipment - Category 7**

**67.140 Circuit Equipment - Category 8**

### STATION EQUIPMENT

**67.151 General**

**67.152 Station Equipment Categories and Apportionment Procedures**

**67.153 Phase Out and Termination of Interstate Apportionment of Customer Premises Equipment in Accounts 231 and 234**

### FURNITURE AND OFFICE EQUIPMENT, VEHICLES AND OTHER WORK EQUIPMENT

**67.161 Furniture and Office Equipment - Account 261**

**67.162 Vehicles and Other Work Equipment - Account 264**

### ORGANIZATION, FRANCHISES, PATENT RIGHTS, TELEPHONE PLANT ACQUIRED AND TELEPHONE PLANT SOLD

**67.171 Organization - Account 201, Franchises - Account 202, and Patent Rights - Account 203**

**67.172 Telephone Plant Acquired - Account 276, and Telephone Plant Sold - Account 277**

### TELEPHONE PLANT UNDER CONSTRUCTION, PROPERTY HELD FOR FUTURE TELEPHONE USE AND TELEPHONE PLANT ACQUISITION ADJUSTMENT

**67.181 Telephone Plant Under Construction - Account 100.2**

**67.182 Property Held for Future Telephone Use - Account 100.3**

**67.183 Telephone Plant Acquisition Adjustment - Account 100.4**

### MATERIAL AND SUPPLIES AND CASH WORKING CAPITAL

**67.191 Material and Supplies - Account 122**

**67.192 Cash Working Capital**

## Subpart C - Operating Revenues And Certain Income And Retained Earnings Accounts

### GENERAL

**67.201 Section Arrangement**

**67.202 General**

### OPERATING REVENUES

**67.211 General**

**67.212 Local Service Revenues**

**67.213 Toll Service Revenues**

**67.214 Miscellaneous Revenues**

**67.215 Uncollectible Revenues**

## CERTAIN INCOME ACCOUNTS

**67.221 Investment Credits - Net - Account 304**

**67.222 Interest Charged to Construction Included in Interest Income - Account 313**

**67.223 Miscellaneous Income - Account 316**

**67.224 Miscellaneous Income Charges - Account 323**

**67.225 Extraordinary Income Credits - Account 360 Extraordinary Income Charges - Account 370**

**67.226 Delayed Income Credits - Account 365 Delayed Income Charges - Account 375**

## CERTAIN RETAINED EARNING ACCOUNTS

**67.231 Miscellaneous Credits to Retained Earnings - Account 402 Miscellaneous Debits to Retained Earnings - Account 413**

## Subpart D - Operating Expenses and Taxes

## GENERAL

**67.301 Section Arrangement**

**67.302 General**

## MAINTENANCE EXPENSES

**67.311 General**

**67.312 Repairs of Outside Plant - Accounts 602.1 to 602.8 Inclusive**

**67.313 Test Desk Work - Account 603**

**67.314 Repairs of Central Office Equipment - Account 604**

**67.315 Repairs of Station Equipment - Account 605**

**67.316 Repairs of Buildings and Grounds - Account 606**

**67.317 Repairs of Public Telephone Equipment - Account 607**

**67.318 Maintaining Transmission Power - Account 610**

**67.319 Employment Stabilization - Account 611**

**67.320 Other Maintenance Expenses - Account 612**

## DEPRECIATION AND AMORTIZATION EXPENSES

**67.331 Depreciation - Account 608**

**67.332 Extraordinary Retirements - Account 609**

**67.333 Amortization of Intangible Property - Account 613**

**67.334 Amortization of Telephone Plant Acquisition Adjustment - Account 614**

## TRAFFIC EXPENSES

67.341 General

67.342 General Traffic Supervision - Account 621

67.343 Service Inspection and Customer Instruction - Account 622

67.344 Operators' Wages - Account 624

67.345 Rest and Lunch Rooms - Account 626

67.346 Operators' Employment and Training - Account 627

67.347 Central Office Stationery and Printing - Account 629; Central Office House Service - Account 630; Miscellaneous Central Office Expenses - Account 631

67.348 Public Telephone Expenses - Account 632

67.349 Other Traffic Expenses - Account 633

67.350 Joint Traffic Expenses—Dr.—Account 634;
Joint Traffic Expenses—Cr.—Account 635

## COMMERCIAL EXPENSES

67.361 General

67.362 General Commercial Administration - Account 640

67.363 Advertising - Account 642 Sales Expense - Account 643

67.364 Connecting Company Relations - Account 644

67.365 Local Commercial Operations - Account 645

67.366 Public Telephone Commissions - Account 648

67.367 Directory Expenses - Account 649

67.368 Other Commercial Expenses - Account 650

## REVENUE ACCOUNTING EXPENSES

67.381 General

67.382 Toll Ticket Processing Expense

67.383 Local Message Processing Expense

67.384 Other Billing and Collecting Processing Expense

67.385 End User Common Line Access Charge Billing Expense

67.386 Other Access Charge Billing Expense

## GENERAL EXPENSES

67.391 General

67.392 Appointment Procedures

## OTHER OPERATING EXPENSES

67.401 General

67.402 Operating Rents - Account 671

**67.403 Relief and Pensions - Account 672**

**67.404 Telephone Franchise Requirements - Account 673**

**67.405 General Services and Licenses - Account 674**

**67.406 Telephone Franchise Requirements - Cr. - Account 676**

### TAXES

**67.411 General**

**67.412 Income Taxes - Federal - Account 306, State and Local - Account 307**

**67.413 Other Operating Taxes - Account 307**

**67.414 Accelerated Depreciation; Income Tax Deferrals and Credits - Accounts 307, 308, 309**

**67.415 Operating Portion of Other Income Tax Accounts - Accounts 326, 327, and 380**

## Subpart E - Reserves

### RESERVES

**67.501 General**

**67.502 Depreciation Reserve - Account 171**

**67.503 Amortization Reserve - Account 172**

**67.504 Accumulated Deferred Income Taxes - Accelerated Tax Depreciation - Account 176**

## Subpart F - Universal Service Factor

### GENERAL

**67.601 General**

### DATA COLLECTION

**67.611 Submission of Information to the Exchange Carrier Association**

**67.612 Updating Information Submitted to the Exchange Carrier Association**

### CALCULATION OF LOOP COSTS FOR EXPENSE ADJUSTMENT

**67.621 National and Study Area Average Unseparated Loop Cost Per Working Loop**

**67.622 National and Study Area Average Loop Cost Per Loop**

### CALCULATION OF EXPENSE ADJUSTMENT - ADDITIONAL INTERSTATE EXPENSE ALLOCATION

**67.631 Expense Adjustment**

### TRANSITIONAL EXPENSE ADJUSTMENT

**67.641 Transition**

## Subpart G - Glossary

## Subpart A - General

## GENERAL

### § 67.1 General

(a) This Part contains an outline of separations procedures for telephone companies on the station-to-station basis. These procedures are applicable either to property costs, revenues, expenses, taxes and reserves as recorded on the books of the company or to estimated amounts.

(1) Where a value basis is used instead of book costs, the "costs" referred to are the "values" of the property derived from the valuation.

(b) The separations procedures set forth in this Part are designed primarily for the allocation of property costs, revenues, expenses, taxes and reserves between state and interstate jurisdictions. For separations, where required, of the state portion between exchange and toll or for separations of individual exchanges or special services, further analyses and studies may be required to adapt the procedures to such additional separations.

(c) The fundamental basis on which separations are made is the use of telephone plant in each of the operations. The first step is the assignment of the cost of plant to categories. The basis for making this assignment is the identification of the plant assignable to each category and the determination of the cost of the plant so identified. The second step is the apportionment of the cost of the plant in each category among the operations by the application of appropriate use factors or by direct assignment.

(d) In assigning book costs to categories, the costs used for certain plant classes are average unit costs which equate to all book costs of a particular account or subaccount; for other plant classes, the costs used are those which either directly approximate book cost levels or which are equated to match total book costs at a given location.

(e) The procedures outlined herein reflect "short-cuts" where practicable and where their application produces substantially the same separations results as would be obtained by the use of more detailed procedures, and they assume the use of records generally maintained by Class A and B telephone companies.

(f) The classification to accounts of telephone property, revenues expenses, etc., set forth in this manual is that prescribed by the Federal Communications Commission's Uniform System of Accounts for Class A and Class B Telephone Companies. For companies subject to other systems of accounts, appropriate adjustments will be required.

(g) In the assignment of property costs to categories and in the apportionment of such costs among the operations, each amount so assigned and apportioned is identified as to the account classification in which the property cost is included. Thus, the separated results are identified by property accounts and apportionment bases are provided for those expenses which are separated on the basis of the apportionment of property costs. Similarly, amounts of revenues and expenses assigned each of the operations are identified as to account classification.

(h) The separations procedures described in this Part are not to be interpreted as indicating what property, revenues, expenses and taxes, or what items carried in the income, reserve and retained earnings accounts, should or should not be considered in any investigation or rate proceeding.

## § 67.2 Fundamental Principles Underlying Procedures

(a) The following general principles underlie the procedures outlined in this Part:

(1) Separations are made on the "actual use" basis, which gives consideration to relative occupancy and relative time measurements.

(2) In the development of "actual use" measurements, measurements of use are (i) determined for telephone plant or for work performed by operating forces on a unit basis (*e.g.*, conversation-minute-mile per message, weighted standard work seconds per call) in studies of traffic handled or work performed during a representative period for all traffic and (ii) applied to overall traffic volumes, *i.e.*, 24-hour rather than busy-hour volumes.

(b) Underlying the procedures included in this manual for the separation of plant costs is an over-all concept which may be described as follows:

(1) Telephone plant, in general, is segregable into two broad classifications, namely, (i) interexchange plant, which is plant used primarily to furnish toll services, and (ii) exchange plant, which is plant used primarily to furnish local services.

(2) Within the interexchange classification, there are three broad types of plant, i.e., manual switching plant, dial switching plant, and circuit plant. Within the exchange classification there are four broad types of plant, i.e., manual switching plant, dial switching plant, trunk plant, and subscriber plant. Subscriber plant comprises subscriber lines and station equipment.

(3) In general, the bases for apportioning telephone plant used jointly for state and interstate operations are:

(i) Operator work time expressed in weighted standard work seconds is the basis for measuring the use of manual switching plant, except for that portion of traffic service position system (TSPS) investment that is not directly associated with operator positions. Real time (*i.e.*, actual seconds) use of the TSPS processor is the basis for measuring the use of this plant, which includes the stored program control, memory and remote trunk arrangement (RTA).

(ii) Holding-time-minutes is the basis for measuring the use of toll dial switching plant and the traffic sensitive portion of local dial switching plant (see § 67.138(b)), with holding-time-minutes of local dial switching equipment weighted to reflect differences in the average cost per holding-time-minute for switching various classes of traffic.

(iii) Conversation-minute-miles is the basis for measuring the use of interexchange circuit plant and holding-time-minutes is the basis for measuring the use of exchange trunk plant. While the use of holding-time-minute-miles is the basic fundamental allocation factor for interexchange circuit plant and exchange trunk plant, the use of conversation-minute-miles for the allocation of interexchange circuit plant and holding-time-minutes for the allocation of exchange trunk plant are considered practical approximations for separations between state and interstate operations when related to the broad types of plant classifications used herein.

(iv) A subscriber plant factor is the basis for apportioning the cost of message telephone subscriber plant and the non-traffic sensitive portion of local dial switching plant between state and interstate operations, except as otherwise provided. The subscriber plant factor is developed by the use of a two part formula (See § 67.124(d)(4)), the first part of which is designed to develop a basic cost per holding time minute of use for application alike to each exchange and toll holding time minute of use and the second part of which is designed to add to the basis cost thus assigned to each toll holding time minute an additive cost reflective of the fact that toll rate schedules inherently have a deterrent effect on the use of non-traffic sensitive plant and that this deterrent effect increases as the distance of the related toll call increases.

(c) Property rented to affiliates, if not substantial in amount, is included as used property of the owning company with the associated revenues and expenses treated consistently: also, such property rented from affiliates is not included with used property of the company making the separation and the rent paid is included in its expenses. If substantial in amount, the following treatment is applied:

(1) in the case of property rented to affiliates, the property and related expenses and rent revenues are excluded from the telephone operations of the owning company, and

(2) in the case of property rented from affiliates, the property and related expenses are included with, and the rent expenses are excluded from, the telephone operations of the company making the separation.

(d) Property rented to non-affiliates is usually to be included as used property of the owning company with the associated revenues and expenses treated consistently. In the event the amount is substantial, the property involved and the revenues and expenses associated therewith may be excluded from the telephone operations of the company. When required, the cost of property rented to non-affiliates is determined using procedures that are consistent with the procedures for the allocation of costs among the operations.

(e) The procedures set forth herein provide for the exclusion from the interstate allocation of all investments and associated reserves and expenses incurred in connection with customer premises equipment after December 31, 1982. Investments in customer premises equipment on the books as of December 31, 1982 will be phased out over a 60 month period for allocation to interstate operations. If so directed or authorized by an administratively and judicially final order or action issued or taken by the State Commission having jurisdiction in any state, a freeze date earlier than December 31, 1982 may be adopted for any company operating within the state with the concurrence of such company. The amount of investment recorded for separations purposes as of that freeze date shall be deemed to be the amount of investment to be used for separations until January 1, 1983. Thereafter, the provision of this Part shall apply as set forth hereafter. Expenses, taxes and reserves shall be frozen as of the plant freeze date in a manner consistent with the provisions set forth hereafter. Consistent treatment is required for the reserves and expenses associated with the phase out of the investment in customer premises equipment.

(1) The procedures described in §§ 67.2(e), 67.153, 67.315(e), 67.331(a)(2), 67.392(a)(1) and 67.502(b) shall apply for purposes of interstate apportionment of customer premises equipment and associated expenses, taxes and reserves for companies that provide exchange service regardless of the actual CPE attributable to regulated operations that is recorded on the books of the company. If the amount apportioned to interstate operations exceeds the amount of CPE attributable to regulated operations, the excess shall be deducted from the total investment or total expense apportioned to state operations. Notwithstanding the transfer of CPE from the BOCs to AT&T pursuant to the AT&T divestiture,[2] responsibility for continuation of the five year phaseout of the interstate

---

[2] The Modified Final Judgement in United States v. AT&T, 552 F. Supp. 131, *aff'd sub. nom.* Maryland v. U.S. 51 U.S.L.W. 3628, February 28, 1983 generally requires AT&T to divest itself of its operating companies which provide local telephone service.

allocation of CPE and associated expenses, taxes and reserves shall remain with the BOCs.

(f) Costs associated with services or plant billed to another company which have once been separated under procedures consistent with general principles set forth in this Part, and are thus identifiable as entirely interstate or intrastate in nature, shall be directly assigned to the appropriate operation and jurisdiction.

## Subpart B - Telephone Property

### GENERAL

### § 67.101 Section Arrangement

(a) This subpart is arranged in sections as follows:

| | Sections |
|---|---|
| General | 67.101–67.102 |
| Telephone Plant in Service – Account 100.1 | |
| Land and Buildings – Accounts 211, 212 | 67.111–67.113 |
| Outside Plant – Accounts 241, 242.1, 242.2, 242.3, 242.4, 243, 244 | 67.121–67.126 |
| Central Office Equipment – Account 221 | 67.131–67.140 |
| Station Equipment – Accounts 231, 232, 234 | |
| Furniture and Office Equipment – Account 261, and Vehicles and Other Work Equipment – Account 264 | 67.161–67.162 |
| Organization – Acount 201, Franchises – Account 202, Patent Rights – Account 203, Telephone Plant Acquired – Account 276, and Telephone Plant Sold – Account 277 | 67.171–67.172 |
| Other Telephone Property | |
| Telephone Plant under Construction – Account 100.2, Property Held for Future Telephone Use – Acount 100.3, and Telephone Plant Acquisition Adjustment – Account 100.4 | 67.181–67.183 |
| Material and Supplies – Account 122, and Cash Working Capital | 67.191–67.192 |

### § 67.102 General

(a) This section contains an outline of the procedures used in the assignment of telephone property to categories and the apportionment of the cost assigned to each category among the operations.

(b) The treatment of plant rented to and rented from others is outlined in §§ 67.2(c) and 67.2(d). In cases where the amount of such plant is substantial, the cost may be determined by using the general procedures set forth for the assignment of the various kinds of property to categories.

(c) The amount of depreciation deductible from the book cost or "value" is apportioned among the operations in proportion to the separation of the cost of the related plant accounts.

## LAND AND BUILDINGS

### § 67.111 General

(a) Land and buildings are carried in the following accounts:

| | |
|---|---|
| Land | Account 211 |
| Buildings | Account 212 |

(b) The separation of land and buildings, including improvements to leased quarters, is based upon the use made of the building or quarters, determined normally by an analysis of floor plan layout drawings or of space occupancy reports used in the clearance of house service expense to operating expense and other accounts. The first step in this analysis normally is the determination of the number of square feet of floor space in use in the building or quarters. An average cost per square foot of floor space in use is computed and is used in assigning the building cost to the several categories into which the space in the building or quarters is subdivided. The cost assigned to each category is then apportioned among the operations as outlined below.

(1) At locations where a significant part of the building cost represents the cost of one or more antenna supporting structures mounted on the building, the cost of the antenna supporting structure or structures is first determined and is deducted from the total building cost at the location to obtain the cost associated with building space. This latter cost is then assigned to categories as discussed in § 67.111(b). The cost of antenna supporting structures is assigned to a separate category.

(2) At locations where a building, a building addition or a portion thereof, constructed at the specific request of another company for interstate service only is used or reserved for central office equipment, the cost of this space may be assigned to a separate category. This cost is deducted from the total building cost before apportioning the building cost as described in § 67.111(b).

### § 67.112 Land

(a) The separation of the cost of land associated with buildings is based on the separation of the cost of the building, or buildings, occupying that land. Land not directly associated with buildings is assigned according to its use. The separation procedures described for buildings are also applicable to land.

### § 67.113 Buildings

(a) General

(1) In the separation among the operations of buildings having more than one of the categories described in § 67.113(b), the building cost, including improvements to leased quarters, is first assigned to the various categories as follows:

(i) Determine the cost of any antenna supporting structures associated with the building and assign that cost to its own category, provided such cost is significant (See § 67.111(b)(1)).

(ii) Determine the cost, where applicable, of space constructed at the specific request of another company for interstate service (See § 67.111(b)(2)) and assign that cost to its own category.

(iii) Determine the number of square feet of floor space which is used, i.e., assigned productive space, including space rented to others. Such space excludes (A) unassigned productive space, (B) unproductive space, i.e., space not adaptable to direct occupancy (e.g., that used for stairways, elevator shafts, heating and ventilating systems), and (C) space described in (ii) above.

(iv) Divide the building cost, other than that described in (i) and (ii) above by the number of square feet of floor space in use and rented to others as determined in (iii).

(v) Apply the unit cost in (iv) to the number of square feet of space assigned to each category to obtain the building space cost assignable to each category.

(A) In assigning costs to categories, generally each building is treated individually, but several buildings may be treated as a group, provided such grouping does not change the separations results.

(2) The building cost assigned to each category is then apportioned among the operations through the application of appropriate use factors or by direct assignment as described in § 67.113(b).

(3) Certain large areas, e.g., medical offices, general employment offices, space occupied by data processing equipment, may require assignment to more than one of the categories in § 67.113(b). This assignment is based on the use of the space or the equipment occupying that space.

(4) Minor amounts of local plant administrative office space, plant maintenance centers, line assignment centers and other plant service centers may be located in buildings where the major portion of the space is assigned to Categories 1, 7, 9 or a combination of these categories. In buildings that contain only one of these categories, such space may be combined with that category. When the building includes space assigned to more than one category, such space may be combined with the most appropriate category based on the major functions performed in the space, e.g., space for a maintenance center used for maintenance of radio relay facilities is assigned to the central office equipment space category.

(b) Building Categories and Apportionment Procedures

(1) Operating Room and Central Office Equipment Space - Category 1 - This category includes the space used by central office equipment (e.g., circuit equipment, toll and local switchboards, including traffic service positions, operating rooms, dial switching equipment, automatic message recording equipment, power plants, cable vaults, and space used by personnel when installing or maintaining central office equipment). The cost of this space, excluding space used or reserved for another company's interstate operations as described in § 67.111(b)(2), is apportioned among the operations in proportion to the separation of the cost of the following types of central office equipment:

(i) Manual switchboard equipment
(ii) Circuit equipment
(iii) Dial Switching equipment

(2) Operators' Quarters - Category 2 - This category includes space (other than operating rooms) used by switchboard operators, *e.g.*, operators' lounges and lunch rooms. The cost of this space is apportioned among the operations on the basis of the relative number of weighted standard work seconds for all switchboards involved.

(3) General Traffic Supervision Space - Category 3 - This category includes the space used by the general traffic supervision forces including that space used solely for operator employment, and that operator training space not assigned to Category 1. The cost of this space is apportioned among the operations in proportion to the separation of General Traffic Supervision expenses.

(4) Commercial Office Space - Category 4 - This category includes the space used

by local commercial offices, commercial and marketing supervisory forces and other office space used by commercial, marketing, sales, or directory forces, or combinations of these forces. The cost of this space is apportioned among the operations in proportion to the separation of General Commercial Administration, Sales expense, Connecting Company Relations and Local Commercial Operations expense, combined.

(5) Space Used by Another Company for Interstate Operations - Category 5 - This category includes space used by employees of another company which is engaged only in the interstate operation, excluding operating rooms, operators quarters and central office equipment space. The cost of this space is assigned directly to the interstate operation.

(6) Revenue Accounting Space - Category 6 - This category includes the space occupied by data processing equipment used primarily for revenue accounting purposes and by employees whose salaries are assigned to revenue accounting operations. The cost of this space is apportioned among the operations in proportion to the separation of Revenue Accounting expenses.

(7) Garages, Storerooms, Warehouses and Pole Yards - Category 7 - This category includes the space used for the storage and care of motor vehicles, supplies and equipment. The cost of this space is apportioned among the operations in proportion to the separation of station equipment, outside plant in service and material and supplies, combined.

(8) Space Rented to Others - Category 8 - This category includes all space rented to others, e.g., barber shops, cigar counters. The cost of this space is assigned consistent with the assignment of the association rent revenues.

(9) General Office Space - Category 9 - This category includes all office space not included in preceding categories, e.g., space used by accounting (other than revenue accounting), executive, treasury, law, engineering and plant supervisory forces, personnel, general archives. The cost of this space is apportioned among the operations in proportion to the separation of general expenses.

(10) Antenna Supporting Structures - Category 10 - This category includes the cost of structures (usually steel towers) used for supporting radio antennae. The cost of these structures is apportioned among the operations in proportion to the separation of the cost of the antennae supported.

(11) Space Constructed at the Specific Request of Another Company for Interstate Service Only - Category 11 - This category includes the cost of a building, a building addition or a portion thereof constructed at the specific request of another company for interstate services only and used or reserved for central office equipment. The cost of this space is assigned directly to the interstate operation.

## OUTSIDE PLANT

### § 67.121 General

(a) Outside plant includes the telephone plant in service in the following accounts:

| | |
|---|---|
| Pole Lines .......................................... | Account 241 |
| Aerial Cable .......................................... | Account 242.1 |
| Underground Cable .......................................... | Account 242.2 |
| Buried Cable .......................................... | Account 242.3 |
| Submarine Cable .......................................... | Account 242.4 |

| | |
|---|---|
| Aerial Wire | Account 243 |
| Underground Conduit | Account 244 |

(b) Where exchange and toll subaccounts of Accounts 242.1, 242.2, 242.3, 242.4 and 243 are maintained, plant is generally charged to these subaccounts following certain broad principles, such as major use rather than actual use. Therefore, in a separation of cable and aerial wire outside plant among the operations on an actual use basis, it is necessary to analyze the plant classified as exchange and toll in the subaccounts in order to determine the plant assignable to each of the categories listed in the following paragraphs.

(c) In the separation of the cost of outside plant among the operations, the first step is the assignment of the plant to certain categories. The basic method of making this assignment is the identification of the plant assignable to each category and the determination of the cost of the plant so identified. Because of variations among companies in the character of the plant and operating conditions, and in the accounting, plant and engineering records maintained, the detailed methods followed, of necessity, will vary among the companies. The general principles to be followed, however, will be the same for all companies.

(d) The second step is the apportionment of the cost of the plant in each category among the operations through the application of appropriate use factors or by direct assignment.

§ 67.122 Categories of Outside Plant

(a) Exchange Outside Plant - Category 1 - This category includes the outside plant other than that in Category 3 in the following three subcategories:

(1) Wideband Subscriber Line Outside Plant - Category 1.1 - This category includes the outside plant between local central offices and subscriber premises used for wideband services.

(2) Exchange Trunk Outside Plant (Wideband and Non-Wideband) - Category 1.2 - This category includes outside plant between central offices or other switching points used by any common carrier for interlocal trunks wholly within an exchange or metropolitan service area, interlocal trunks carrying extended area service traffic, interlocal trunks with one or both terminals outside a metropolitan service area carrying some exchange traffic, toll connecting trunks, tandem trunks principally carrying exchange traffic, the exchange trunk portion of TWX and WATS access lines, the exchange trunk portion of private line local channels, and the exchange trunk portion of circuits between control terminals and radio stations providing very high frequency maritime service or urban or highway mobile service.

(3) Subscriber Line Outside Plant Excluding Wideband - Category 1.3. - This category includes outside plant between local central offices and subscriber premises used for message telephone including WATS access lines and TWX subscriber lines, for private line local channels and for circuits between control terminals and radio stations providing very high frequency maritime service or urban or highway mobile service. This category also includes outside plant between local central offices and public telephones.

(4) The procedures for apportioning the cost of exchange outside plant among the operations are set forth in § 67.124.

(b) Interexchange Outside Plant - Category 2 - This category includes outside plant other than that included in Categories 1 and 3, used for message toll and toll private line services. It includes outside plant carrying intertoll circuits, tributary circuits, the interexchange channel portion of special service circuits, circuits between control terminals and radio stations used for overseas or coastal harbor service, interlocal trunks between offices in different exchange or metropolitan service areas carrying only message toll traffic and certain tandem trunks which carry principally message toll traffic.

(1) The procedures for apportioning the cost of interexchange outside plant among the operations, and the description of the following subsidiary categories established for the purpose are set forth in § 67.125:

Outside Plant Furnished to Another Company For Interstate Use - Category 2.1
Outside Plant Used for Wideband Services - Category 2.2
All Other Interexchange Outside Plant - Category 2.3

(c) Host/Remote Message Outside Plant - Category 3 - This category includes the cost of message host/remote location outside plant for which a message circuit switching function is performed at the host central office. It applies to outside plant facilities between host offices and all remote locations.

(1) The procedures for apportioning the cost of Category 3 host/remote outside plant among the operations are set forth in § 67.126.

§ 67.123 Assignment of Outside Plant to Categories

(a) Aerial Cable - Account 242.1
Underground Cable - Account 242.2
Buried Cable - Account 242.3
Submarine Cable - Account 242.4

(1) Cable

(i) There are two basic methods for assigning the cost of cable to the various categories. Both of them are on the basis of conductor cross section. The methods are as follows:

(A) By section of cable, uniform as to makeup and relative use by categories. From an analysis of cable engineering and assignment records, determine in terms of equivalent gauge the number of pairs in use, or reserved, for each category. The corresponding percentages of use, or reservation, are applied to the cost of the section of cable, *i.e.*, sheath feet times unit cost per foot, to obtain the cost assignable to each category.

(B) By using equivalent pair miles, *i.e.*, pair miles expressed in terms of equivalent gauge. From an analysis of cable engineering and assignment records, determine the equivalent pair miles in use for each category by types of facility, e.g., quadded, paired. The equivalent pair miles are then divided by a cable fill factor to obtain the equivalent pair miles in plant. The total equivalent pair miles in plant assigned to each category is summarized by types of facility, e.g., quadded and paired, and priced at appropriate average unit costs per equivalent pair mile in plant. If desired, this study may be made in terms of circuit miles rather than physical pair miles, with average cost and fill data consistent with the basis of the facilities mileage count.

(ii) In the assignment of the cost of cable under the two basic methods described in § 67.123(a)(1)(i) consideration is given to the following:

(A) Method (A) above will probably be found more desirable where there is a relatively small amount of cable of variable make-up and use by categories. Conversely, method (B) above will probably be more desirable where there is a large amount of cable of variable make-up and use by categories. However, there may be cases where a combination of both methods may be desirable.

(B) It will be desirable in some cases to determine the amount assignable to a particular category by deducting from the total the sum of the amounts assigned to all other categories.

(C) For use in the assignment of poles to categories, the equivalent sheath miles of aerial cable assigned to each category are determined. For convenience, these quantities are determined in connection with the assignment of cable costs.

(D) Where an entire cable is assignable to one category, its cost and quantity are, where practicable, directly assigned.

(iii) For cables especially arranged for high-frequency transmission such as shielded, disc-insulated and coaxial, recognition is given to the additional costs which are charged to the high-frequency complement.

(2) Cable Loading

(i) Methods for assigning the cost of loading coils, cases, etc., to categories are comparable with those used in assigning the associated cable to categories. Loading associated with cable which is directly assigned to a given category is also so assigned. The remaining loading is assigned to categories on either of the following bases:

(A) By an analysis of the use made of the loading facilities where a loading coil case includes coils assignable to more than one category, e.g., in the case of a single gauge uniformly loaded section, the percentages used in the related cable assignment are applicable, or

(B) By pricing out each category by determining the pair feet of loaded pairs assigned to each category and multiplying by the unit cost per pair foot of loading by type.

(3) Other Cable Plant

(i) In view of the small amounts involved, the cost of all protected terminals and gas pressure contactor terminals in the toll cable subaccounts is assigned to the appropriate Interexchange Outside Plant categories. The cost of all other terminals in the exchange and toll cable subaccounts is assigned to Exchange Outside Plant Category 1.3.

(b) Aerial Wire - Account 243

(1) The cost of wire accounted for as exchange is assigned to the appropriate Exchange Outside Plant categories. The cost of wire accounted for as toll, which is used for exchange, is also assigned to the appropriate Exchange Outside Plant categories. The cost of the remaining wire accounted for as toll is assigned to the appropriate Interexchange Outside Plant categories as described in § 67.125. For companies not maintaining exchange and toll subaccounts, it is necessary to review the plant records and identify wire plant by use. The cost of wire used for providing circuits directly assignable to a category is assigned to that category. The cost of wire used for providing circuit facilities jointly used for exchange and interexchange lines is assigned to categories on the basis of the relative number of circuit miles involved.

(c) Pole Lines - Account 241

(1) In the assignment of the cost of pole lines, anchors, guys, crossarms, and right-of-way are included with the poles, but antenna supporting structures are treated separately.

(2) Poles

(i) The cost of poles is assigned to categories based on the miles of aerial wire and aerial cable supported by poles. The miles of aerial wire and equivalent sheath miles of aerial cable, as developed in the cable and wire studies, are expressed in terms of equivalent miles of 104 wire. The equivalent miles of 104 wire are summarized separately for each category. The ratio of equivalent 104 wire miles for each category to the total equivalent 104 wire miles in the study area is applied to the total cost of poles to obtain the cost assignable to each category.

(3) Antenna Supporting Structures

(i) The cost of antenna supporting structures included in Pole Lines - Account 241 is assigned to categories on the basis of the assignment of the cost of the antennae supported.

(d) Underground Conduit - Account 244

(1) The cost of underground conduit is assigned to categories on the basis of the assignment of the cost of underground cable.

### § 67.124 Exchange Outside Plant Categories and Apportionment Procedures

(a) For the apportionment of the cost of exchange outside plant among the operations, further segregations of the cost of plant assigned Category 1 are required. Procedures for the assignment of outside plant costs to subsidiary categories are set forth in § 67.123.

(b) Wideband Subscriber Line Outside Plant - Category 1.1 - The cost of outside plant assignable to this category in the study area is determined separately for each wideband subscriber line outside facility and assigned to the appropriate subsidiary category as follows:

Category 1.11 Subscriber line outside plant for interstate private line services.

Category 1.12 Subscriber line outside plant for intrastate private line services.

Category 1.13 Subscriber line outside plant for wideband message services.

(1) The costs in Categories 1.11 and 1.12 are each assigned directly to the appropriate operation. The cost in Category 1.13 is segregated by type of wideband service and is apportioned between state and interstate operations on the basis of the relative number of minutes of use of each type of wideband service in the study area.

(c) Exchange Trunk Outside Plant (Wideband and Non-Wideband) - Category 1.2 - The cost of the exchange outside plant assignable to this category in the study area is separately identified for the following subsidiary categories:

Category 1.21 Trunk plant used exclusively for exchange message services.

Category 1.22 Trunk plant used exclusively for toll message services (including trunks used exclusively for WATS access) or jointly for exchange and toll message services.

Category 1.23 Trunk plant used for TWX access lines.

Category 1.24 Trunk plant used exclusively for interstate private line services.

Category 1.25 Trunk plant used exclusively for state private line services.

(1) The costs in Categories 1.21, 1.24, and 1.25 are assigned directly to the appropriate operation. The cost in Category 1.22 is apportioned between state and interstate operations on the basis of the relative number of minutes of use of this plant in the study area. The cost in Category 1.23 for the study area is

apportioned between state and interstate operations on the basis of the relative number of TWX minutes of use for the study area.

(d) Subscriber Line Outside Plant Excluding Wideband - Category 1.3 - The first step in apportioning the cost of the subscriber line outside plant among the operations is the determination of an average cost per working loop. This average cost per working loop is determined by dividing the total cost of subscriber line outside plant assigned Category 1.3 in the study area by the sum of the working loops described in subcategories 1.31, 1.32, 1.33 and 1.34. The cost of the subscriber line outside plant assigned Category 1.3 is further assigned to the following subsidiary categories and apportioned in accordance with §§ 67.124(d)(1) - 67.124(d)(4).

Category 1.31 Subscriber line outside plant used exclusively for state private line services.

Category 1.32 Subscriber line outside plant used exclusively for interstate private line services.

Category 1.33 Subscriber line outside plant used jointly for exchange service and toll message services, including WATS access lines.

Category 1.34 - Subscriber line outside plant used for TWX service.

(1) The cost of subscriber line outside plant assigned Category 1.34 for the study area is determined by multiplying the average cost per loop determined in § 67.124(d) by the number of working subscriber lines used in furnishing TWX service. The amount so assigned is apportioned between state toll and interstate toll on the basis of the relative number of TWX minutes of use for the study area.

(2) The average subscriber line outside plant cost per loop determined in § 67.124(d) is applied to the counts of working loops used in furnishing state and interstate private line local channels (excluding wideband), and the amounts so determined are assigned to categories 1.31 and 1.32 and are assigned directly to the appropriate operations.

(3) The cost of subscriber line outside plant assigned Category 1.33 is determined by subtracting amounts assigned TWX service, and private line service in §§ 67.124(d)(1) and 67.124(d)(2) from the total cost assigned Category 1.3 in the study area.

(4) (i) The cost of subscriber line outside plant in Category 1.33 is apportioned between state and interstate operations until January 1, 1986, by the application, to the cost of such plant, of a subscriber plant factor, which is the sum of the following:

(A) Annual average interstate subscriber line use (SLU), for the calendar year 1981,[3] representing the interstate use of the subscriber plant as measured by the ratio of interstate holding time minutes of use to total holding time minutes of use applicable to traffic originating and terminating in the study area, multiplied by .85, the nationwide ratio of subscriber plant costs assignable to the exchange operation per minute of exchange use to total subscriber plant cost per total minute of use of subscriber plant plus

(B) Twice the annual average interstate subscriber line use ratio for the study area for the calendar year 1981,[3] multiplied by the annual average composite station rate ratio used for the calendar year 1981 (ratio of the nationwide, industry-wide average interstate initial 3-minute station charge at the study area average interstate length of haul to the nationwide, industry-wide average total toll initial 3-minute station charge at the nationwide average length of haul for all toll traffic for the total telephone industry).

---

[3] In the case of a company that cannot calculate the average interstate subscriber line usage (SLU) ratio for the calendar year 1981, the average interstate SLU for the customarily used 12-month study period ending in 1981 may be utilized. In the case of a company for which no such 1981 annual average SLU exists, the annual averge interstate SLU for the initial study period will be utilized.

(ii) Effective January 1, 1986, the plant in OSP Category 1.33 shall be apportioned between the state and interstate operations as provided in §§ 67.124(d)(5) - 67.124(d)(7)

(5) Effective January 1, 1986, 25 percent of the plant investment in OSP Category 1.33 will be allocated to the interstate operation, except as otherwise provided in §§ 67.124(d)(6) and 67.124(d)(7).

(6) The interstate allocations of OSP Category 1.33 plant investment for the years 1986, 1987 and 1988 will be as follows, subject to the limitation contained in § 67.124(d)(7):

(i) 1986 - The § 67.124(d)(4)(i) allocation factor multiplied by .75 plus .0625.

(ii) 1987 - The § 67.124(d)(4)(i) allocation factor multiplied by .5 plus .125.

(iii) 1988 - The § 67.124(d)(4)(i) allocation factor multiplied by .25 plus .1875.

(7) Limit on Change in Interstate Allocation.

(i) No study area's percentage interstate allocation for inside wire, OSP Category 1.33 and COE Category 8.13 plant investment as well as associated maintenance and depreciation shall decrease by a total of more than ten percentage points from one calendar year to the next as a result of the combined operations of § 67.124(d)(5), § 67.124(d)(6) and §§ 67.641(a) through 67.641(c).

(ii) The determination of whether the decrease in the interstate allocation for a given study area resulting from the operation of § 67.124(d)(6) and §§ 67.641(a) through 67.641(c) exceeds ten percentage points shall be made by calculating a percentage interstate allocation for both of the years involved. This shall be done by dividing the interstate allocation of OSP Category 1.33, COE Category 8.13 and inside wire plus associated expenses for each year as calculated pursuant to § 67.124(d)(7)(iv) by the total unseparated investment in OSP Category 1.33, COE Category 8.13 and inside wire plus associated expenses for the corresponding year as calculated pursuant to § 67.124(d)(7)(v).

(iii) If the resulting percentage for the more recent of the two years is more than ten percentage points less than the percentage for the earlier year, the decrease in the interstate allocations shall be reduced pro rata for plant investment, maintenance and depreciation so that the difference between the two percentages does not equal more than ten percentage points.

(iv) Add the following:

(A) the net interstate allocation of OSP Category 1.33 plant investment calculated pursuant to § 67.124(d)(5) and § 67.124(d)(6) multiplied by the authorized interstate rate of return.

(B) the net interstate allocation of inside wire associated with OSP Category 1.33 calculated pursuant to § 67.124(d)(5) and § 67.124(d)(6) multiplied by the authorized interstate rate of return.

(C) the interstate allocation of maintenance and depreciation attributable to OSP Category 1.33 and inside wire investment associated with OSP Category 1.33 calculated pursuant to § 67.124(d)(5) and § 67.124(d)(6).

(D) the amount of the additional interstate expense allocation calculated pursuant to §§ 67.641(a) through 67.641(c).

(v) Add the following:

(A) the net unseparated OSP Category 1.33 plant investment multiplied by the authorized interstate rate of return.

(B) the net unseparated inside wire investment associated with OSP Category 1.33 multiplied by the authorized interstate rate of return.

(C) the unseparated maintenance and depreciation attributable to OSP Category 1.33 investment and inside wire investment associated with OSP Category 1.33.

§ 67.125 Interexchange Outside Plant Categories and Apportionment Procedures

(a) For the apportionment of the cost of interexchange outside plant among the operations, further segregations of the cost of plant assigned Category 2 are required. Procedures for the assignment of outside plant to subsidiary categories are set forth in § 67.123.

(b) Outside Plant Furnished to Another Company For Interstate Use - Category 2.1 - This category comprises that outside plant provided for the use of another company as an integral part of its interexchange circuit plant facilities used wholly for interstate services. This category includes such outside plant facilities as sections of whole cables or complements in a cable (e.g., coaxial complement), loading attached to conductors owned by other companies, and conduit enclosing another company's cable used wholly for interstate services. The total cost of the plant in this category for the study area is determined by an analysis of accounting and engineering records and is assigned directly to the interstate operation.

(c) Outside Plant Facilities Used for Wideband Services - Category 2.2 - The cost of outside plant assignable to this category in the study area is determined separately for each wideband interexchange channel facility, excluding wideband channel facilities included in Category 2.1, and is assigned to the appropriate subsidiary category as follows:

Category 2.21 Interexchange plant for interstate private line services.

Category 2.22 Interexchange plant for intrastate private line services.

Category 2.23 Interexchange plant for message services.

(1) The costs in Categories 2.21 and 2.22 are each assigned directly to the appropriate operation. The cost in Category 2.23 is segregated by type of wideband service and is apportioned between state and interstate operations on the basis of the relative number of message-minute-miles of use of the plant assigned to each wideband service in the study area.

(d) All Other Interexchange Outside Plant - Category 2.3 - This category includes the cost of all interexchange outside plant not assigned to Categories 2.1 and 2.2. The cost of outside plant used for the following classes of circuits is included in this category: interstate message circuits, i.e., message circuits carrying only interstate message traffic; state message circuits, i.e., message circuits carrying only state message traffic; jointly used message circuits, i.e., message switching plan circuits other than those listed above; circuits used exclusively for TWX service; circuits used for interstate private line services; and circuits used for state private line services.

(1) An average interexchange outside plant cost per equivalent interexchange telephone circuit mile for all circuits in Category 2.3 is determined and applied to

the equivalent interexchange telephone circuit mileage counts of each of the classes of circuits.

(2) The cost of interstate message circuits and interstate private line circuits is assigned directly to the interstate operation.

(3) The cost of state message circuits and state private line circuits is assigned directly to the state operation.

(4) The cost of jointly used message circuits is apportioned between state and interstate operations on the basis of the relative number of study area conversation-minute-miles applicable to such facilities.

(5) The cost of TWX circuits, developed as set forth in §§ 67.125(d) and 67.125(d)(1) is apportioned between state and interstate operations as follows:

(i) The cost associated with the TWX intertoll circuits which, by use, are directly assignable to a given operation is assigned directly to the appropriate operation.

(ii) The cost associated with the TWX intertoll circuits used jointly for state and interstate operations is apportioned between the operations on the basis of the relative number of study area TWX connection-minute-miles applicable to such facilities.

(iii) The cost associated with the interexchange portion of TWX remote access lines is apportioned between state and interstate operations on the basis of the relative number of study area TWX connection-minute-miles applicable to those facilities.

### § 67.126 Host/Remote Message Outside Plant Category and Apportionment Procedures

(a) Host/Remote Message Outside Plant - Category 3 - The cost of host/remote outside plant used for message circuits, i.e., circuits carrying only message traffic, is included in this category.

(1) The cost of host/remote message outside plant for the study area is apportioned on the basis of the relative number of study area minutes-of-use miles applicable to such facilities.

## CENTRAL OFFICE EQUIPMENT

### § 67.131 General

(a) Central office equipment is carried in Account 221.

(b) Records are usually maintained of the cost of central office equipment at each location separately by subaccounts. However, each subaccount frequently includes equipment having more than one use. Also, equipment in one subaccount frequently is associated closely with equipment in the same building in another subaccount. Therefore, the separation procedures for central office equipment have been designed to deal with categories of plant rather than with equipment in a subaccount.

(c) In the separation of the cost of central office equipment among the operations, the first step is the assignment of the equipment in each central office to categories. The basic method of making this assignment is the identification of the equipment assignable to each category, and the determination of the cost of the identified equipment by an analysis of accounting, engineering and other records.

(1) The cost of common equipment not assigned to a specific category, e.g., common power equipment, including emergency power equipment, aisle lighting and framework, including distributing frames, is distributed among the catego-

ries in proportion to the cost of equipment, (excluding power equipment not dependent upon common power equipment) directly assigned to categories.

(i) The cost of power equipment used by one category is assigned directly to that category, e.g., 130 volt power supply provided for circuit equipment. The cost of emergency power equipment protecting only power equipment used by one category is also assigned directly to that category.

(ii) Where appropriate, a weighting factor is applied to the cost of circuit equipment in distributing the power plant costs not directly assigned, in order to reflect the generally greater power use per dollar of cost of this equipment.

(d) The second step is the apportionment of the cost of the equipment in each category among the operations through the application of appropriate use factors or by direct assignment.

## § 67.132 Categories and Apportionment Procedures

(a) imThe following categories of central office equipment and apportionment procedures therefore are set forth in §§ 67.133 - 67.140.

Manual Telephone Switching Equipment - Category 1

Dial Tandem Switching Equipment - Category 2

Intertoll Dial Switching Equipment - Category 3

Automatic Message Recording Equipment - Category 4

Other Toll Dial Switching Equipment - Category 5

Local Dial Switching Equipment - Category 6

Special Services Switching Equipment - Category 7

Circuit Equipment - Category 8

## § 67.133 Manual Telephone Switching Equipment - Category 1

(a) Manual telephone switching equipment includes all types of manual telephone switchboards except dial tandem switchboards and those used solely for recording of calling telephone numbers in connection with customer dialed charge traffic. It includes all face equipment, terminating relay circuits of trunk and toll line circuits, cord circuits, cable turning sections, subscriber line equipment, associated toll connecting trunk equipment, number checking facilities, ticket distributing systems, calculagraphs, chief operator and other desks, operator chairs, and other such equipment.

(1) Manual telephone switching equipment is generally classified according to operating arrangements of which the following are typical:

(i) Separate toll boards

(ii) Separate local manual boards

(iii) Combined local manual and toll boards

(iv) Combined toll and DSA boards

(v) Separate DSA and DSB boards

(vi) Service observing boards

(vii) Auxiliary service boards

(viii) Traffic service positions

(2) If switchboards as set forth in § 67.133(a) are of the key pulsing type, the cost of the key pulsing senders, link and trunk finder equipment is included with the switchboards.

(3) DSB boards include the associated DSB dial equipment, such as link and sender equipment.

(4) Traffic service position systems include the common control and trunk equipment in addition to the associated groups of positions wherever located.

(b) The cost of the following telephone switchboards is apportioned among the operations on the basis of the relative number of weighted standard work seconds handled at the switchboards under consideration.

(1) The following types of switchboards at toll centers are generally apportioned individually:

(i) Separate toll boards. These usually include outward, through and inward positions in separate lines and associated inward toll switchboard positions in line with local manual positions.

(ii) Switchboards handling both local and toll, either combined or having segregated local and toll positions in the same line.

(iii) Switchboards handling both toll and DSA, either combined or having segregated toll and DSA positions in the same line.

(iv) Traffic service positions, including separately located groups of these positions when associated with a common basic control unit.

(2) The following types of switchboards at toll centers are apportioned individually, or by groups of comparable types of boards for each exchange:

(i) Separate local manual boards. This includes the local positions of manual boards where inward toll positions are in the same line.

(ii) Separate DSA boards.

(iii) Separate DSB boards.

(3) Tributary boards may be treated individually if warranted or they may be treated on a group basis.

(c) Auxiliary service boards generally handle rate and route, information, and intercept service at individual or joint positions. The cost of these boards is apportioned as follows:

(1) The cost of separate directory assistance boards is apportioned among the operations on the basis of the relative number of weighted standard work seconds handled at the boards under consideration. Directory assistance weighted standard work seconds are apportioned among the operations on the basis of the classification of these weighted standard work seconds as follows:

(i) Directory assistance weighted standard work seconds first are classified between calls received over toll directory assistance trunks from operators or customers and all other directory assistance calls.

(ii) The directory assistance weighted standard work seconds of each type further are classified separately among the operations on the basis of an analysis of a representative sample of directory assistance calls of each type with reference to the locations of the calling and called stations for each call.

(2) The cost of separate intercept boards and automated intercept systems in the

study area is apportioned among the operations on the basis of the relative number of subscriber line minutes of use.

(3) The cost of separate rate and route boards is generally included with the cost of the toll boards served and is apportioned with those boards.

(4) Where more than one auxiliary service is handled at an auxiliary board, the cost of the board is apportioned among the auxiliary services on the basis of the relative number of weighted standard work seconds for each service. The cost of that part of the board allocated to each auxiliary service is apportioned among the operations in the same manner as for a separate auxiliary board.

(d) The cost of joint exchange and toll service observing boards is first apportioned between exchange and toll use on the basis of the relative number of exchange and toll service observing units at these boards. The cost of separate toll service observing boards and the toll portion of joint service observing boards is apportioned between state and interstate operations on the basis of the relative number of toll minutes of use associated with the toll messages originating in the offices observed.

(e) Traffic Service Position System investments are apportioned as follows:

(1) Operator position investments are apportioned on the basis of the relative weighted standard work seconds for the entire TSPS complex.

(2) Remote trunk arrangement (RTA) investments are apportioned on the basis of the relative processor real time (*i.e.*, actual seconds) required to process TSPS traffic originating from the end offices served by each RTA.

(3) The remaining investment at the central control location, such as the stored program control and memory, is apportioned on the basis of the relative processor real time (*i.e.*, actual seconds) for the entire TSPS complex.

### § 67.134 Dial Tandem Switching Equipment—Category 2

(a) Dial tandem switching equipment includes all dial switching equipment in a tandem central office, including any associated dial tandem switchboard positions. Equipment, including switchboards, used for recording of calling telephone numbers and other billing information in connection with customer dialed charge traffic is included with Automatic Message Recording Equipment—Category 4.

(1) The cost of dial tandem switching equipment which primarily handles exchange or short-haul toll traffic or both is apportioned among the operations on the basis of the relative number of connections at the tandem office.

(2) The cost of dial tandem switching equipment which handles significant amounts of long-haul toll traffic incoming to or outgoing from a tandem area is apportioned among the operations on the basis of the relative number of minutes of use at each location.

### § 67.135 Intertoll Dial Switching Equipment—Category 3

(a) Intertoll dial switching equipment includes dial switching equipment, (e.g., No. 4 type toll crossbar switching equipment, intertoll dial selector equipment, intertoll trunk equipment in No. 5 type crossbar and electronic offices) used for the interconnection of message toll telephone circuits with each other or with local or tandem central office trunks or, used to furnish through switching of special services.

(1) At toll center toll offices, intertoll dial switching equipment comprises equipment in the toll office used in the interconnection of: toll center to toll center circuits; toll center to tributary circuits; tributary to tributary circuits; toll center to tandem circuits; or in the interconnection of the aforementioned types of circuits with trunks to local offices in the toll center city, i.e., interconnection

with toll switching trunks, operator trunks, information trunks, testing trunks, etc. Equipment associated with the local office end of such trunks is included with local dial switching equipment or switchboard categories as appropriate.

(2) At tributary offices, this category includes intertoll dial switching equipment similar to that at toll center toll offices if it is used in the interconnection of: tributary to tributary circuits; tributary to subtributary circuits; subtributary to subtributary circuits; toll center to subtributary circuits; or if it is used jointly in the interconnection of any of the aforementioned types of circuits and in the interconnection of such toll circuits with trunk circuits for the handling of traffic terminating in the tributary office. Where comparable equipment has no joint use but is used only for the handling of traffic terminating in the tributary office, it is included in the local dial switching equipment category.

(3) At all switching entities, this category includes intertoll dial switching equipment similar to that at toll center toll offices if it is used in the interconnection of switched private line trunks or TWX switching plan trunks when these functions are in addition to the message telephone switching function. Switching entities wholly dedicated to switching of special services are assigned to Category 7.

(b) The cost of central office equipment items assigned this category are apportioned among the operations on the basis of the relative number of minutes of use of the intertoll dial switching equipment, or by direct assignment. Generally, the equipment at each location is apportioned separately; however, for offices having the same type of equipment, e.g., intertoll dial selector equipment, apportionment may be by groups of offices provided the amounts involved are small and the unit cost of the selector equipment in each office of a group is comparable.

## § 67.136 Automatic Message Recording Equipment—Category 4

(a) Automatic message recording equipment comprises the central office equipment used for the identification, recording and timing of customer dialed charge traffic, or switched private line traffic (e.g., transverters, recorders, call identity indexers, perforators, ticketers, detectors, master timers) switchboards used solely for recording of calling telephone numbers in connection with customer dialed charge traffic, or switched private line traffic (or both).

(b) The cost of this equipment at each location is first segregated between equipment used for the entire duration of a call, e.g., ticketers, and equipment used only momentarily, e.g., perforators, switchboards.

(1) The cost of equipment used for the entire duration of a call is apportioned among the operations on the basis of the relative number of minutes of use incurred on customer dialed charge traffic or switched private line traffic (or both) automatically recorded at each location.

(2) The cost of equipment used only momentarily is apportioned among the operations on the basis of the relative number of automatically ticketed messages involving customer dialed charge traffic or switched private line traffic (or both) automatically recorded at each location.

## § 67.137 Other Toll Dial Switching Equipment—Category 5

(a) Other toll dial switching equipment comprises all that dial central office switching equipment provided and used primarily for operator dialed toll or customer dialed charge traffic except such equipment included in Dial Tandem Switching Equipment—Category 2, Intertoll Dial Switching Equipment—Category 3, Automatic Message Recording Equipment—Category 4, or toll connecting trunk and completing equipment in Local Dial Switching Equipment—Category 6.

(1) Other toll dial switching equipment includes such items as directors, translators, sender registers, out trunk selectors and facilities for toll intercepting and digit absorption.

(b) The cost of this equipment is apportioned among the operations on the basis of the relative minutes of use of the equipment in each location.

§ 67.138 Local Dial Switching Equipment—Category 6

(a) Local dial switching equipment comprises all dial central office switching equipment not assigned other categories. Examples of local dial switching equipment are basic switching train, toll connecting trunk equipment, interlocal trunks, tandem trunks, terminating senders used for toll completion, toll completing train, call reverting equipment, weather and time of day service equipment, concentration equipment, and switching equipment at electronic analog or digital remote line locations.

(1) Local dial office, as used in § 67.138, comprises one or more local dial switching entities of the same equipment type (e.g., step-by-step, No. 5 Crossbar) in an individual location. A local dial switching entity comprises that local dial central office equipment of the same type which has a common intermediate distributing frame, marker group or other separately identifiable switching unit serving one or more prefixes (NNX codes).

(2) A host/remote local dial switching complex is composed of an electronic analog or digital host office and all of its remote locations. A host/remote local dial switching complex is treated as one local dial office. The current jurisdictional definition of an exchange will apply.

(b) The cost of this equipment in each local dial office is first segregated between non-traffic sensitive equipment and traffic sensitive equipment. The cost of non-traffic sensitive equipment comprises the cost of those items of equipment used jointly for both exchange and toll services, the quantities of which are determined as a function of the number of subscriber lines terminated and which in no way are a function of the busy hour or total volumes of attempts, calls, or messages offered to or switched by the office, together with a share of the cost of common equipment items, such as aisle lighting, ladders and ladder racks and framing, test equipment, power plants, etc., determined in the manner described in § 67.131(c)(1). The cost of traffic sensitive equipment comprises the cost of all other local dial switching equipment, including its share of the cost of common equipment items.

(1) The segregation of the cost of local dial switching equipment is accomplished in each local dial office by the application of a non-traffic sensitive equipment factor appropriate for the particular type of equipment (step-by-step, panel, crossbar, electronic-analog or digital, etc.) installed in the office and for the size of the office. The non-traffic sensitive factors are developed by means of analyses of the cost of local dial switching equipment in selected local dial offices which are representative of the several types and size ranges and which are chosen for study by sampling methods which represent the population.

(c) The cost of non-traffic sensitive equipment in each office in a study area is apportioned between state and interstate operations by the application of a subscriber plant factor for the study area developed as described in § 67.124(d)(4)(i). The cost of traffic sensitive plant in each office is apportioned among the operations on the basis of relative dial equipment minutes of use, i.e., the minutes of holding time of the originating and terminating local dial switching equipment, as holding time is defined in the Glossary. The toll dial equipment minutes of use applicable to each office are weighted to reflect the difference in average cost per toll minute of use as compared to the average cost per exchange minute of use.

(1) The weighted toll dial equipment minutes of use applicable to each office are

developed by application of a weighting factor appropriate for the particular type of equipment (step-by-step, panel, crossbar, electronic-analog or digital, etc.) installed in the office, the size of the office, and whether or not a majority of the traffic originated in the office also terminates in the office. The weighting factors for application to the toll minutes of use are developed by means of analyses of the traffic sensitive local dial switching equipment in local dial offices selected for study by sampling methods which represent the population. The analyses of the traffic sensitive items of equipment are made in sufficient detail to reflect the use of each item of equipment for exchange and for toll services.

(2) Dial equipment minutes of use attributable to the origination or termination of interstate message services other than MTS and WATS that use local dial switching facilities shall be counted as interstate minutes of use, but shall not be deemed to be toll dial equipment minutes of use for purposes of the weighting factor described in § 67.138(c)(1).

## § 67.139 Special Services Switching Equipment—Category 7

(a) Special services switching equipment includes those switching systems (e.g., dial switching equipment, TWX concentrators and switchboards) which primarily perform the switching function for special services.

(b) The cost of special services dial switching systems is apportioned among the operations on the basis of the relative number of minutes-of-use at each location, or by direct assignment.

(c) The cost of TWX switchboards is apportioned among the operations on the basis of relative number of TWX traffic units or weighted standard work seconds handled at each location.

(d) The cost of TWX concentrators associated with TWX remote access lines is apportioned on the basis of the relative number of study area TWX minutes-of-use applicable to this equipment.

(e) The cost of switchboards used exclusively for private line services is apportioned on the basis of the relative number of state and interstate private lines served.

## § 67.140 Circuit Equipment—Category 8

(a) Circuit equipment includes central office equipment, other than switching equipment and automatic message recording equipment, which is used to derive communications transmission channels or which is used for the amplification, modulation, regeneration, testing, balancing or control of signals transmitted over communications transmission channels. Examples of circuit equipment in general use include:

(1) Carrier telephone and telegraph system terminals.

(2) Telephone and telegraph repeaters, termination sets, impedance compensators, pulse link repeaters, echo suppressors and other intermediate transmission amplification and balancing equipment except that included in switchboards.

(3) Radio transmitters, receivers, repeaters and other radio central office equipment except message switching equipment associated with radio systems.

(4) Composite ringers, line signaling and switching pad circuits.

(5) Composite sets and repeating coils.

(6) Program transmission amplifiers, monitoring devices and volume indicators.

(7) Testboards, test desks, repair desks and patch bays, including those provided for test and control, and for telegraph and transmission testing.

(b) For apportionment among the operations, the cost of circuit equipment is assigned to the following subsidiary categories which are consistent with those established for outside plant:

(1) Exchange Circuit Equipment—Category 8.1

(i) Wideband Exchange Loop Circuit Equipment—Category 8.11

(ii) Exchange Trunk Circuit Equipment (Wideband and Non-Wideband)—Category 8.12

(iii) Subscriber Line Circuit Equipment Excluding Wideband—Category 8.13

(2) Interexchange Circuit Equipment—Category 8.2

(i) Interexchange Circuit Equipment Furnished to Another Company for Interstate Use—Category 8.21

(ii) Interexchange Circuit Equipment Used for Wideband Services—Category 8.22

(iii) All Other Interexchange Circuit Equipment—Category 8.23

(3) Host/Remote Message Circuit Equipment—Category 8.3

In addition, for the purpose of identifying and separating property associated with special services, circuit equipment included in Categories 8.12 other than wideband equipment, 8.13 and 8.23 is identified as being (i) basic circuit equipment, i.e., that which performs functions necessary to provide and operate channels suitable for voice transmission (telephone grade channels), or (ii) special circuit equipment, i.e., that which is peculiar to special service circuits. Carrier telephone terminals and carrier telephone repeaters are examples of basic circuit equipment in general use, while audio program transmission amplifiers, bridges, monitoring devices and volume indicators, telegraph carrier terminals and telegraph repeaters are examples of special circuit equipment in general use.

(4) Costs of exchange circuit equipment included in Categories 8.12 and 8.13 are segregated between (i) basic circuit equipment and (ii) special circuit equipment only at those locations where amounts of exchange special circuit equipment are significant. Where such segregation is not made, the total costs in these categories are classified as exchange basic circuit equipment.

(c) Apportionment of Exchange Circuit Equipment Among the Operations

(1) Wideband Exchange Loop Circuit Equipment—Category 8.11—The cost of exchange circuit equipment in this category is determined separately for each wideband facility. The respective costs are allocated to the appropriate operation in the same manner as the related exchange loop outside plant as described in §§ 67.124(b) and 67.124(b)(1).

(2) Exchange Trunk Circuit Equipment (Wideband and Non-wideband)—Category 8.12—The cost of exchange circuit equipment associated with this category for the study area is assigned to subcategories and is allocated to the appropriate operation in the same manner as the related exchange trunk outside plant as described in §§ 67.124(c) and 67.124(c)(1).

(3) Subscriber Line Circuit Equipment Excluding Wideband—Category 8.13—The cost of Circuit Equipment associated with exchange subscriber line plant excluding wideband for the study area is assigned to subcategories and is allocated to the appropriate operation in the same manner as the related Subscriber Line Outside Plant for non-wideband service as described in §§ 67.124(d) and 67.124(d)(1) through 67.124(d)(7).

(d) Apportionment of Interexchange Circuit Equipment Among the Operations.

(1) Interexchange Circuit Equipment Furnished to Another Company for Interstate Use—Category 8.21—This category comprises that circuit equipment provided for the use of another company as an integral part of its interexchange circuit facilities used wholly for interstate services. This category includes such circuit equipment as telephone carrier terminals, telegraph carrier terminals, and microwave systems used wholly for interstate services. The total cost of the circuit equipment in this category for the study area is assigned to the interstate operation.

(2) Interexchange Circuit Equipment Used for Wideband Service—Category 8.22—This category includes the circuit equipment portion of interexchange channels used for wideband services. The cost of interexchange circuit equipment in this category is determined separately for each wideband channel and is segregated between message and private line services on the basis of the use of the channels provided. The respective costs are allocated to the appropriate operation in the same manner as the related interexchange outside plant as described in §§ 67.125(c) and 67.125(c)(1).

(3) All Other Interexchange Circuit Equipment—Category 8.23—This category includes the cost of all interexchange circuit equipment not assigned to Categories 8.21 and 8.22.

(i) The cost of interexchange basic circuit equipment used for the following classes of circuits is included in this Category: interstate message circuits, i.e., message circuits carrying only interstate message traffic; state message circuits, i.e., message circuits carrying only state message traffic; jointly used message circuits, i.e., message switching plan circuits other than those listed above; circuits used exclusively for TWX service; circuits used for interstate private line services; and circuits used for state private line services.

(A) An average interexchange circuit equipment cost per equivalent interexchange telephone circuit mile for all circuits in Category 8.23 is determined and applied to the equivalent interexchange telephone circuit mileage counts of each of the classes of circuits.

(B) The cost of interstate message circuits and interstate private line circuits is assigned directly to the interstate operation.

(C) The cost of state message circuits and state private line circuits is assigned directly to the state operation.

(D) The cost of jointly used message circuits is apportioned between state operations and interstate operations on the basis of the relative number of study area conversation-minute-miles applicable to such facilities.

(E) The cost of interexchange circuit equipment assigned TWX circuits, developed as set forth in §§ 67.140(d)(3)(i) and 67.140(d)(3)(i)(A) is apportioned between state and interstate toll operations as follows:

(1) The cost of circuit equipment associated with the TWX intertoll circuits which by use are directly assignable to a given operation is assigned directly to the appropriate operation.

(2) The cost of circuit equipment associated with the TWX intertoll circuits used jointly for state and interstate operations is apportioned between the operations on the basis of the relative number of study area TWX connection-minute-miles applicable to such facilities.

(3) The cost of circuit equipment associated with the interexchange portion of the TWX remote access lines is apportioned between state and interstate

operations on the basis of the relative number of study area TWX connection-minute-miles applicable to those facilities.

(ii) The cost of special circuit equipment is segregated among TWX service, telegraph grade private line services and other private line services based on an analysis of the use of the equipment. The cost of TWX special circuit equipment is apportioned between state and interstate operations on the same basis as that used for intertoll TWX circuits. The special circuit equipment cost assigned to telegraph grade and other private line services is directly assigned to the appropriate operation.

(e) Apportionment of Host/Remote Message Circuit Equipment Among the Operations.

(1) Host/Remote Message Circuit Equipment - Category 8.3. This category includes message host/remote location circuit equipment for which a message circuit switching function is performed at the host central office associated with outside plant Category 3 as defined in § 67.122(c).

(i) The category 8.3 cost of host/remote circuit equipment assigned to message services for the study area is apportioned among the exchange, intrastate toll, and interstate toll operations on the basis of the relative number of study area minutes-of-use-miles applicable to such facilities.

## STATION EQUIPMENT

### § 67.151 General

(a) Station equipment is included in the following accounts:

| | |
|---|---|
| Station Apparatus .................................................... | Account 231 |
| Station Connections ................................................ | Account 232 |
| Large Private Branch Exchanges ............................................. | Account 234 |
| Public Telephone Equipment ............................................. | Account 235 |

(1) The investments in Accounts 231 and 234 shall be segregated between customer premises equipment and other station equipment. Customer premises equipment shall be apportioned among the operations as set forth in §§ 67.153(a) and 67.153(b). (Other station equipment shall be apportioned in accordance with § 67.152).

(2) The first step in the separation of station equipment is the segregation of station connections in Accounts 232 and 234 other than inside wiring provided for private line services from all other investment. This plant is apportioned between the state and interstate operations on the same basis as OSP Category 1.33 described in §§ 67.124(d)(4) through 67.124(d)(7).

(b) The next step is the assignment of the remaining plant to the five categories listed below and the determination of the cost of the plant so assigned. The basic procedures followed in making the assignments and cost determinations are: the identification of the units of station equipment installed on customers' premises assignable to Categories 1, 2, 3 and 4; determination of the related costs in these categories by the application of an appropriate average unit cost to the units so identified; and the assignment of the remaining station equipment cost to Category 5.

(1) Identification of the units of station equipment installed on customers' premises is accomplished by the use of plant, accounting and engineering records

supplemented by field inventories, where necessary. Where the numbers of units to be identified are large, sampling methods may be employed. Under such circumstances, however, the costs of telephone and miscellaneous telephone station apparatus in Account 231 and telephone and miscellaneous telephone station connections in Account 232 are assigned to Category 2 by applying to these costs in the study area the ratio of (i) the number of exchange loops used for telephone private line services to (ii) the number of message telephone subscriber lines and exchange loops used for telephone private line services, combined.

(2) Each average unit cost of station apparatus used in the cost determinations includes the cost of station apparatus not installed on customers' premises. To include appropriate proportions of the cost of station apparatus not installed on customers' premises, a separate factor ordinarily is determined for each of (i) teletypwriter, (ii) telephone and miscellaneous and (iii) radio apparatus and is applied to the corresponding unit costs of station apparatus installed on customers' premises.

(3) Only that station equipment provided under special service tariffs (e.g., special terminating equipment, trunk circuit equipment, idle circuit terminations, signaling equipment, telephone sets, keys, key sets and turrets which are used for the termination of special service circuits) is assigned to the special service categories. Correspondingly, station equipment used jointly for both special services and message telephone services (e.g., telephone keys, key sets, order turrets, private branch exchange switchboards which are used for the termination of both private lines and exchange lines) and provided under other than special service tariffs is assigned to Category 5.

(c) The second step in the separation of station equipment among the operations is the apportionment of the cost of plant in each category through the application of appropriate use factors or by direct assignment.

### § 67.152 Station Equipment Categories and Apportionment Procedures

(a) Teletypewriter Exchange Service—Category 1—This category includes all station equipment provided for teletypewriter exchange service. The cost of the equipment in this category is apportioned between state and interstate on the basis of the realtive number of TWX minutes-of-use for the study area.

(b) Private Line Services—Category 2—This category includes station equipment provided for private line services. The cost of equipment in this category is allocated among the operations by direct assignment. Consistent with the principle expressed in § 67.151(b)(3), the direct assignment among the operations is consistent with the related tariffs.

(c) Station Identification Equipment—Category 3—This category includes the cost of station identification equipment, e.g., spotter cams, transistor units, in Station Apparatus—Account 231, and Large Private Branch Exchanges—Account 234. This equipment is used for the purpose of identifying the calling station for automatic message recording purposes. The cost of the equipment in this category is apportioned among the operations on the basis of the relative number of messages automatically recorded by the associated central office equipment.

(d) Wideband Message Service—Category 4—This category includes the cost of station equipment provided for wideband message services. The cost of the equipment for each service in this category is apportioned to the operations on the basis of the relative minutes-of-use of this plant used for each service in the study area.

(e) Other Station Equipment—Category 5—This category includes all station equipment not assigned to other categories. The cost of station equipment assigned to this category in the study area is apportioned between state and interstate operations by the application of a subscriber plant factor developed as described in §§ 67.124(d)(4) - 67.124(d)(7).

### § 67.153 Phase Out and Termination of Interstate Apportionment of Customer Premises Equipment in Accounts 231 and 234.

(a) New Customer Premises Equipment - No portion of any investment in customer premises equipment in Accounts 231 and 234 which may be entered on the books of the company after December 31, 1982 shall be apportioned to interstate operations.

(b) Phase Out of Customer Premises Equipment Recorded as of December 31, 1982 - The recorded investments of customer premises equipment in Accounts 231 and 234 which are on the books as of December 31, 1982 shall be assigned to the five categories set forth under § 67.152. Equipment assigned to category 2 shall be apportioned as provided in § 67.152(b). The amount of plant investment so determined in all other categories, reduced by one-sixtieth, shall be apportioned between state and interstate operations in accordance with the procedures prescribed for each category under § 67.152 for the month of January, 1983. Each month thereafter, the base December 31, 1982 amount shall be reduced by one-sixtieth of the base amount in each category, and the apportionment between state and interstate operations shall be made in a similar manner. After 60 months the amounts in each category will be reduced to zero, and no apportionment of any such customer premises equipment to interstate operations shall thereafter be made. Companies that have a separations study period different than monthly may establish equal periods for reducing the base amounts consistent with such study periods to write off the base amount in 5 years.

## FURNITURE AND OFFICE EQUIPMENT, VEHICLES AND OTHER WORK EQUIPMENT

### § 67.161 Furniture and Office Equipment—Account 261

(a) The cost of furniture and office equipment is first segregated between (1) data processing equipment used primarily for one function, and (2) other.

(b) The cost of the data processing equipment used primarily for one function is apportioned among the operations on a basis appropriate for the separation of the work functions performed.

(c) The cost of the other furniture and office equipment in this account is apportioned among the operations on the basis of the separation of the wage portion of maintenance, traffic, commercial and revenue accounting expenses excluding the wage portion of maintenance expense related to general office space.

### § 67.162 Vehicles and Other Work Equipment—Account 264

(a) The cost of vehicles and other work equipment is apportioned among the operations on the basis of the separation of the cost of outside plant, station equipment and material and supplies, combined.

## ORGANIZATION, FRANCHISES, PATENT RIGHTS, TELEPHONE PLANT ACQUIRED AND TELEPHONE PLANT SOLD

### § 67.171 Organization—Account 201, Franchises—Account 202, and Patent Rights—Account 203

(a) The amount included in these accounts is apportioned among the operations on the basis of the separation of the cost of Telephone Plant in Service—Account 100.1, excluding Accounts 201, 202, 203, 276 and 277.

### § 67.172 Telephone Plant Acquired—Account 276, and Telephone Plant Sold—Account 277

(a) The amount included in these accounts is apportioned among the operations on the basis of the separation of the cost of Telephone Plant in Service—Account 100.1, excluding Accounts 201, 202, 203, 276 and 277.

(1) If the amount involved is of sufficient magnitude to affect the separation results materially, a more detailed study is made.

## TELEPHONE PLANT UNDER CONSTRUCTION, PROPERTY HELD FOR FUTURE TELEPHONE USE AND TELEPHONE PLANT ACQUISITION ADJUSTMENT

### § 67.181 Telephone Plant Under Construction—Account 100.2

(a) The amount carried in Account 100.2 for each primary plant account is apportioned among the operations on the basis of the apportionment of the cost in the same primary plant in service account. Significant amounts in Account 100.2 for a building or building addition, or major portion thereof, together with associated land, being constructed at the specific request of another company for interstate services are assigned directly to the interstate operation.

### § 67.182 Property Held for Future Telephone Use—Account 100.3

(a) The cost of large items, e.g., land and buildings, carried in Account 100.3 is apportioned among the operations on bases consistent with the nature of the case. The remainder of the cost carried in Account 100.3 for each primary plant account is apportioned among the operations on the basis of the apportionment of the cost in the same primary plant in service account.

### § 67.183 Telephone Plant Acquisition Adjustment—Account 100.4

(a) The amount carried in Account 100.4 which is associated with specific primary plant accounts is apportioned among the operations on the basis of the apportionment of the cost in the corresponding primary plant in service accounts.

(b) The remainder of this account, which is not classified by primary plant accounts, is apportioned among the operations on the basis of the separation of the cost of Telephone Plant in Service—Account 100.1.

## MATERIAL AND SUPPLIES AND CASH WORKING CAPITAL

### § 67.191 Material and Supplies—Account 122

(a) The amount included in Account 122 is apportioned among the operations on the basis of the apportionment of the cost of outside plant in service. Starting with January 1, 1983 any amounts included in Account 122 associated with customer premises equipment shall be excluded from the amounts which are allocated to the interstate operation.

### § 67.192 Cash Working Capital

(b) The amount for cash working capital, if not determined directly for a particular operation, is apportioned among the operations on an appropriate basis.

## Subpart C - Operating Revenues And Certain Income And Retained Earnings Accounts

## GENERAL

### § 67.201 Section Arrangement

**(a) This subpart is arranged in sections, as follows:**

| | Sections |
|---|---|
| General | 67.201 - 67.202 |
| Operating Revenues - Accounts 500 to 530, inclusive | 67.211 - 67.215 |
| Certain Income Accounts - Accounts 316, 323, 360, 365, 370, 375 and Interest Charged to Construction Included in Account 313 | 67.221 - 67.226 |
| Certain Retained Earnings Accounts - Accounts 402 and 413 | 67.231 |

### § 67.202 General

**(a) This section sets forth procedures for the apportionment among the operations of operating revenues and certain income and retained earnings accounts.**

## OPERATING REVENUES

### § 67.211 General

**(a) Operating revenues are included in the following accounts:**

| | |
|---|---|
| Subscribers Station Revenues | Account 500 |
| Public Telephone Revenues | Account 501 |
| Service Stations | Account 503 |
| Local Private Line Services | Account 504 |
| Other Local Service Revenues | Account 506 |
| Message Tolls | Account 510 |
| Wide Area Tolls Services | Account 511 |
| Toll Private Line Services | Account 512 |
| Other Toll Services Revenues | Account 516 |
| Telegraph Commissions | Account 521 |
| Directory Advertising and Sales | Account 523 |
| Rent Revenues | Account 524 |
| Revenues from General Services and Licenses | Account 525 |
| Other Operating Revenues | Account 526 |
| Uncollectible Operating Revenues - Dr. | Account 530 |

**§ 67.212 Local Service Revenues**

**(a) Subscribers' Station Revenues—Account 500**

**(1) Subscribers' station revenues, (other than those associated with wideband message services) comprising monthly and miscellaneous charges, message charges, service connections, and moves and changes, are assigned to the exchange operation.**

**(2) Subscribers' station revenues associated with wideband message services are treated as follows:**

**(i) Local message revenues are assigned to the exchange operation.**

**(ii) Other wideband message service revenues included in this account are apportioned between state and interstate operations on the basis of the relative number of minutes of use for such services in the study area.**

**(b) Public Telephone Revenues—Account 501**

**Service Stations—Account 503**

**(1) Revenues included in these accounts are assigned to the exchange operation.**

**(c) Local Private Line Services—Account 504**

**(1) Local private line service revenues from broadcast program transmission audio services and broadcast program transmission video services are assigned to the interstate operation.**

**(2) Revenues in this account from all other local private line services are assigned to the exchange operation.**

**(d) Other Local Service Revenues—Account 506**

**(1) Revenues included in this account are assigned to the exchange operation.**

**(2) Revenues that are attributable to the origination or termination of interstate FX or CCSA like services shall be assigned to the interstate jurisdiction.**

**§ 67.213 Toll Service Revenues**

**(a) Message Tolls—Account 510**

**(1) Telephone and Miscellaneous Services**

**(i) In the separation of message toll revenues from telephone and miscellaneous services, the first step is to apportion between state toll and interstate toll operations, the gross charges for (A) messages that are sent paid and received collect at the company's telephones in the study area, and (B) joint messages that are sent paid and received collect at connecting company telephones. This is done by direct assignment on the basis of analyses and studies. The second step is to add or deduct, as appropriate, toll settlements with other companies. The separation between state toll and interstate toll operations of such settlements with other companies is based upon data made available in connection with studies underlying those settlements.**

**(2) TWX Services**

**(i) In the separation of message toll revenues from TWX services, the first step is to apportion between state toll and interstate toll operations, the gross charges for (A) connections that are handled on a sent paid and received collect basis at company stations within the study area, and (B) joint connections that are handled on a sent paid and received collect basis at stations of connecting**

companies. This is done by direct assignment on the basis of analyses and studies. The second step is to add or deduct, as appropriate, toll settlements with other companies. The separation between state toll and interstate toll operations of such settlements with other companies is based upon data made available in connection with studies underlying those settlements.

(ii) TWX revenues from monthly and miscellaneous charges, service connections, move and change charges, are apportioned between state and interstate operations on the basis of the relative number of TWX minutes-of-use in the study area.

(3) Wideband Message Services.

(i) In the separation of wideband message service revenues from messages between points in different local service areas, the first step is to apportion between state toll and interstate toll operations, the gross charges for (A) messages that are sent paid and received collect at the company's station terminals in the study area; and (B) joint messages that are sent paid and received collect at connecting company station terminals. This is done by direct assignment on the basis of analyses and studies. The second step is to add or deduct, as appropriate, toll settlements with other companies. The separation between state toll and interstate toll operations of such settlements with other companies is based upon data made available in connection with studies underlying those settlements.

(ii) Wideband message service revenues from station terminal monthly charges, service connection charges and move charges are apportioned between state and interstate operations on the basis of the relative number of minutes-of-use for such services in the study area.

(b) Wide Area Toll Services—Account 511

(1) In the separation of revenues from wide area toll services, the first step is to apportion between state toll and interstate toll operations the gross charges for wide area toll services billed in the study area. This is done by direct assignement on the basis of analyses and studies. The second step is to add or deduct, as appropriate, settlements with other companies. The separation between state and interstate operations of such settlements with other companies is based upon data made available in connection with studies underlying those settlements.

(c) Toll Private Line Services—Account 512

(1) Toll private line service revenues from broadcast program transmission audio services and broadcast program transmission video services are assigned to the interstate operation.

(2) In the separation of revenues from all other toll private line services, the first step is to apportion between state toll and interstate toll operations, the gross charges for (A) the toll private line services furnished exclusively by the company in the study area, and (B) services furnished jointly with other companies. This is done by direct assignment on the basis of analyses and studies. The second step is to add or deduct, as appropriate, settlements with other companies. The separation between state toll and interstate toll operations of such settlements with other companies is based upon data made available in connection with studies underlying those settlements.

(d) Other Toll Service Revenues—Account 516

(1) Revenues in this account are apportioned between state toll and interstate toll operations on the basis of an analysis of the services furnished.

### § 67.214 Miscellaneous Revenues

(a) Telegraph Commissions—Account 521

Directory Advertising and Sales—Account 523

(1) Revenues in these accounts are assigned to the exchange operation.

(b) Rent Revenues—Account 524

(1) As covered in §§ 67.2(c) and 67.2(d) the treatment of revenues in this account is consistent with the treatment of plant furnished under rental agreements in the separation of telephone property.

(c) Revenues from General Services and Licenses—Account 525

(1) Revenues in this account are apportioned among the operations on a basis consistent with the method employed in determining the amounts of such revenues.

(d) Other Operating Revenues—Account 526

(1) Revenues in this account are apportioned among the operations on the basis of an analysis of the services furnished.

### § 67.215 Uncollectible Revenues

(a) Uncollectible Operating Revenues—Dr. —Account 530

(1) The amounts in this account are apportioned among the operations on the basis of an analysis, during a representative period, of certain amounts charged to the subaccount of Due from Customers and Agents—Account 118, entitled Reserve for Uncollectible Accounts—Cr. The amounts analyzed are those applicable to revenue accounts 500, 503, 504, 510, 511, 512 and 523.

## CERTAIN INCOME ACCOUNTS

### § 67.221 Investment Credits—Net—Account 304

(a) Amounts in this account are apportioned among the operations on the basis of the separation of the cost of Telephone Plant in Service—Account 100.1.

### § 67.222 Interest Charged to Construction Included in Interest Income—Account 313

(a) Interest charged to construction is apportioned among the operations on the basis of the apportionment of the cost of the portion of Telephone Plant Under Construction, Account 100.2, on which the interest charged to construction was accrued.

### § 67.223 Miscellaneous Income—Account 316

(a) Amounts of an operating nature included in this account are apportioned among the operations on bases consistent with the nature of the items.

### § 67.224 Miscellaneous Income Charges—Account 323

(a) Amounts of contributions for charitable, social or community welfare purposes, employee activities, membership dues and fees in service clubs, community welfare associations and similar organizations are apportioned among the operations on the basis of the apportionment of general expenses.

(b) Other amounts of an operating nature included in this account are apportioned among the operations on bases consistent with the nature of the items.

### § 67.225 Extraordinary Income Credits—Account 360 Extraordinary Income Charges—Account 370

(a) Amounts of an operating nature included in these accounts are apportioned among the operations on bases consistent with the nature of the items.

### § 67.226 Delayed Income Credits—Account 365 Delayed Income Charges—Account 375

(a) Amounts of an operating nature included in these accounts are apportioned among the operations on bases consistent with the nature of the items.

## CERTAIN RETAINED EARNINGS ACCOUNTS

### § 67.231 Miscellaneous Credits to Retained Earnings—Account 402 Miscellaneous Debits to Retained Earnings—Account 413

(a) Amounts of an operating nature included in these accounts are apportioned among the operations on bases consistent with the nature of the items.

## Subpart D - Operating Expenses And Taxes

## GENERAL

### § 67.301 Section Arrangement

(a) This subpart is arranged in sections as follows:

| | Sections |
|---|---|
| General | 67.301 - 67.302 |
| Maintenance Expenses - Accounts 602.1 to 602.8, inclusive, 603, 604, 605, 606, 610, 611 and 612 | 67.311 - 67.320 |
| Depreciation and Amortization Expenses - Accounts 608, 609, 613 and 614 | 67.331 - 67.334 |
| Traffic Expenses - Accounts 621, 622, 624, 626, 627, 629, 630, 631, 632, 633, 634 and 635 | 67.341 - 67.350 |
| Commercial Expenses - Accounts 640, 642, 643, 644, 645, 648, 649 and 650 | 67.361 - 67.368 |
| Revenue Accounting Expenses Included in Account 662 | 67.381–67.386 |
| General Expenses - Accounts 661, 662 663, 664, 665, 668, 669, 675 and 677, excluding Revenue Accounting Expenses included in Account 662 | 67.391 - 67.392 |
| Other Operating Expenses - Accounts 671, 672, 673, 674, and 676 | 67.401 - 67.406 |
| Taxes - Accounts 306, 307, 308, 309, 326, 327 and 380 | 67.411 - 67.415 |

### § 67.302 General

(a) This section sets forth procedures for the apportionment among the operations of operating expenses and operating taxes.

(b) As covered in §§ 67.2(c) and 67.2(d), the treatment of expenses relating to plant furnished to and obtained from others under rental arrangements is consistent with the treatment of such plant.

## MAINTENANCE EXPENSES

### § 67.311 General

(a) Maintenance expenses are included in the following accounts:

| | |
|---|---|
| Repairs of Pole Lines | Account 602.1 |
| Repairs of Aerial Cable | Account 602.2 |
| Repairs of Underground Cable | Account 602.3 |
| Repairs of Buried Cable | Account 602.4 |
| Repairs of Submarine Cable | Account 602.5 |
| Repairs of Aerial Wire | Account 602.6 |
| Repairs of Underground Conduit | Account 602.7 |
| Shop Repairs and Salvage Adjustments | Account 602.8 |
| Test Desk Work | Account 603 |
| Repairs of Central Office Equipment | Account 604 |
| Repairs of Station Equipment | Account 605 |
| Repairs of Buildings and Grounds | Account 606 |
| Repairs of Public Telephone Equipment | Account 607 |
| Maintaining Transmission Power | Account 610 |
| Employment Stablization | Account 611 |
| Other Maintenance Expenses | Account 612 |

(b) The general method of separating maintenance expenses among the operations is to relate various kinds of maintenance expenses to the cost of the corresponding classes, subclasses or categories of plant, after which the separation is made in proportion to the separation of the cost of those classes, subclasses, or categories of plant.

### § 67.312 Repairs of Outside Plant—Accounts 602.1 to 602.8 Inclusive

(a) Outside plant maintenance expenses, excluding those in Account 602.8, are apportioned among the operations by applying to the cost of the outside plant in each of the various primary plant accounts assigned to each operation, the ratio of the maintenance expenses associated with each primary plant account to the costs in that plant account.

(b) Shop Repairs and Salvage Adjustments—Account 602.8 is apportioned among the operations on the basis of the separation of the cost of Aerial Cable—Account 242.1.

### § 67.313 Test Desk Work—Account 603

(a) Test desk work includes the following:

Subscribers Line and Service Order Testing Trunk Testing

For some companies, these classifications are available from accounting records; otherwise, they are obtained by means of analyses of plant, accounting or other records for a representative period.

(b) Testing of Subscriber Lines and Service Order Testing

(1) This classification consists of the expense of subscriber line and service order testing ordinarily performed at local test desks or cabinets, at repair service desks, at cable fault locating desks, at local radiotelephone control terminals, base station transmitters, base station receivers and monitors, and at microwave transmitters and receivers used for local video services. It includes the expense of testing in connection with inside moves, service regrades and other rearrangements of station equipment covered by service orders. It also includes the associated clerical work and the receiving and recording of reports of exchange plant troubles.

(2) Expense in this classification is segregated among (i) message services (including WATS access) (ii) private line, (iii) TWX and (iv) wideband services, on the basis of the relative number of working subscriber loops provided for each of these services. In cases where substantial numbers of private line, TWX or wideband service loops are provided, and where either the analyses in §67.313(a) or analyses of trouble reports on private line, TWX and wideband services indicate that the exchange circuit plant testing expense per loop associated with any of such services is significantly different from the corresponding expense per loop associated with message services (including WATS access), appropriate weighting factors are applied to the counts of loops used for private line, TWX and wideband services. These weighting factors are based on periodic analyses of accounting or other records for a representative period.

(3) Subscriber line and service order testing expense assigned message telephone (including WATS access) is apportioned between state and interstate operations on the same basis as that used for the apportionment of the cost of OSP Category 1.33.

(4) Exchange circuit plant testing expense assigned TWX is apportioned between state and interstate operations on the basis of the relative number of TWX minutes-of-use.

(5) Exchange circuit plant testing expense assigned private line services is apportioned among the operations on the basis of the relative number of working loops (weighted if appropriate) used in furnishing exchange, state toll, interstate toll and private line local channels.

(6) Exchange circuit plant testing expense assigned wideband services is apportioned among the operations on the basis of the relative number of working loops (weighted if appropriate) used in furnishing exchange, state toll and interstate toll wideband loops.

(c) Trunk Testing

(1) The expense in this classification consists of test desk work performed in central offices and repeater stations in connection with interoffice trunks and other interoffice circuits and channels and with exchange loops and stations of private line circuits when such work is performed at positions where the interoffice portions of these circuits are tested. It includes the expense of (i)

receiving and recording reports of circuit trouble, (ii) arranging for clearance of trouble, (iii) trouble testing, fault location and all other tests of interoffice outside plant in connection with maintenance, except in cases where outside plant conductors assigned to interoffice circuits cannot be readily identified in exchange test centers, and (iv) routine tests of complete interoffice circuits or portions of interoffice circuits, including transmission and other interoffice circuits, including transmission and other adjustments required for proper operation, but excluding tests of central office equipment and any related adjustments. It also includes associated clerical expense and the expense of handling circuit orders, private line service orders and traffic control orders.

(2) Expense in this classification is segregated between that associated with testing of (i) wideband channel circuit facilities and (ii) all other, on the basis of an analysis of accounting or other records for a representative period.

(3) The expense of testing wideband channels which is performed at video test centers is assigned to video. This expense is apportioned between state and interstate operations on the basis of the relative number of video channel miles assigned each of these operations in the study area. Expense of testing wideband channels at other than video test centers is apportioned between state and interstate operations on the basis of the relative number of wideband channel miles (including video) assigned each of these operations in the study area. Where analyses of the testing expense for wideband channels indicates significant differences in the expense per wideband channel mile for channels of different bandwidths or for different types of services, the channel miles are weighted to reflect such differences. The weighting factors are based on periodic analyses of accounting or other records for a representative period.

(4) The expense of testing all other inter-office circuit plant is further segregated among exchange trunk plant, interexchange circuit plant, and host/remote message circuit plant on the basis of the relative number of circuit miles provided for each of these classifications in the study area. In cases where substantial numbers of circuit miles are provided for TWX service, or private line services (other than wideband special services) or exchange trunks, and where analyses of trouble reports or other records indicate that the testing expense associated with any of these classifications is significantly different from the corresponding expense per circuit mile associated with message interexchange service (including WATS access) circuit miles, appropriate weighting factors are applied to the counts of circuit miles for individual classifications to recognize this difference in testing expense. These weighting factors are based on periodic studies of charges to Account 603 for interoffice circuit plant testing during a representative period.

(i) Where circiit miles of exchange trunks are not available or the data to develop appropriate weighting factors are not available, the testing expense for exchange trunks is developed from a special analysis of plant and accounting records.

(ii) Testing expense allocated to exchange trunk plant is further segregated among the classes of exchange trunk plant described in §67.124(c) on the basis of the relative number of circuit miles or by the analysis described in §67.313(c)(4)(i). These expenses are then assigned to the state or interstate operation on the basis of the separation of the associated exchange trunk plant costs.

(5) The interexchange circuit trunk testing expense is further segregated among message telephone, TWX, and private line services on the basis of the relative number of interexchange circuit miles (weighted, if appropriate) provided for each of these services in the study area.

(i) Interexchange circuit plant testing expense assigned message telephone is apportioned between state and interstate operations on the basis of the relative number of interexchange message telephone circuit miles in the study area assigned each operation. Jointly used circuit miles are apportioned between state and interstate operations on the basis of conversation-minute-miles.

(ii) Interexchange circuit plant testing expense assigned TWX is apportioned between state toll and interstate toll operations on the basis of the relative number of interexchange TWX circuit miles in the study area assigned each operation. Jointly used TWX circuit miles are apportioned between state and interstate operations on the basis of TWX connection-minute-miles determined separately for intertoll circuits and remote access lines.

(iii) Interexchange circuit plant testing expense assigned private line services is apportioned between state and interstate operations on the basis of the relative number of interexchange private line circuit miles (weighted, if appropriate) in the study area assigned each operation.

(6) Host/Remote message circuit plant testing expense is apportioned among the exchange, intrastate toll, and interstate toll operations on the basis of study area minutes-of-use-miles.

### §67.314 Repairs of Central Office Equipment—Account 604

(a) The expense in this account is apportioned among the operations on the basis of the separation of the cost of Central Office Equipment—Account 221.

### §67.315 Repairs of Station Equipment—Account 605

(a) The expense in this account is classified as follows:

Ordinary Repairs
Rearrangements and Changes
Shop Repairs and Salvage Adjustments
Inside Wiring Installation Expense

For some companies, this classification is available from accounting records; otherwise, it is obtained by means of analyses of plant, accounting or other records for a representative period.

(b) Ordinary Repairs

(1) This classification includes the expense of: routine inspection, testing and repairs of station equipment; repairs and testing of station equipment in the course of clearing trouble; replacing defective or deteriorated minor items of station apparatus or large private branch exchanges (excluding the cost of material other than repair parts); replacing dry-cell batteries; and producing power at private branch exchanges, excluding any testing which is included in Account 603.

(2) Expense in this classification is segregated into amounts associated with large private branch exchanges; radiotelephone station equipment; TWX station equipment; private line teletypewriter station equipment; and telephone and miscellaneous station equipment, on the basis of an analysis of accounting or other records for a representative period.

(3) Ordinary repairs expense assigned large private branch exchanges is further segregated between repairs of those large private branch exchanges which are used exclusively for private line services, and all other. This segregation is made on the basis of an analysis of records underlying the accounts for a representative period.

(i) Ordinary repairs expense assigned large private branch exchanges used exclusively for private line services is apportioned among the operations on the basis of the separation of the cost of the large private branch exchanges with which this expense is associated.

(ii) All other ordinary repairs expense assigned large private branch exchanges is apportioned among the operations on the basis of the separation of the cost of large private branch exchanges, excluding the cost of those described in §67.315(b)(3)(i).

(4) Ordinary repairs expense assigned radiotelephone station equipment is apportioned among the operations on the basis of the apportionment of the cost of radiotelephone station equipment included in Accounts 231 and 232.

(5) Ordinary repairs expense assigned TWX station equipment is apportioned between state and interstate operations on the basis of the relative number of TWX minutes-of-use for the study area.

(6) Ordinary repairs expense assigned private line teletypewriter station equipment is apportioned among the operations on the basis of the apportionment of the cost of private line teletypewriter station equipment included in Accounts 231 and 232.

(7) Ordinary repairs expense assigned telephone and miscellaneous station equipment is apportioned among the operations on the basis of the apportionment of the cost of telephone and miscellaneous station equipment included in Accounts 231 and 232.

(c) Rearrangements and Changes

(1) This classification includes the expense of: rearrangements and changes in location of station equipment on the same premises (inside moves); changes in type of station apparatus items in good condition, except for the cost of material other than repair parts; the work done at customers' premises incident to service regrades, including temporary suspensions of service where billing continues, but at a reduced rate; and replacing minor items of large private branch exchanges which are in good condition, excluding the cost of replacing retirement units.

(2) Expense in this classification is segregated into amounts associated with: large private branch exchanges; radiotelephone station equipment; TWX station equipment; private line teletypewriter station equipment; and telephone and miscellaneous station equipment, on the basis of an analysis of records for a representative period.

(3) Each expense segregation set forth in §67.315(c)(2) is apportioned among the operations on the same basis as the apportionment of the corresponding segregation of ordinary repairs expense as set forth in §§67.315(b)(3)-67.315(b)(7).

(d) Shop Repairs and Salvage Adjustments

(1) This classification includes the expense of: shop repairs and conversions of station equipment for reuse; salvage adjustments or credits related to station equipment material, the salvage value of which is creditable to this account and which cannot practicably be allocated to other classifications of expense in this account; supply expense cleared on the basis of station apparatus being reused; and transporting station equipment material to and from repair shops.

(2) Expense in this classification is apportioned among the operations on the basis of the apportionment of station equipment ordinary repairs expense, excluding ordinary repairs of large private branch exchanges.

(e) Phase Out and Termination Provision

(1) No portion of any maintenance expense in Account 605 associated with new customer premises equipment in Accounts 231 and 234 except Category 2 equipment which may be entered on the books of the company after December 31, 1982 shall be apportioned to interstate operations.

(2) The average monthly recorded maintenance expense in Account 605 associated with Ordinary Repairs plus Shop Repairs and Salvage Adjustments of customer premises equipment in Accounts 231 and 234 (excluding amounts for rearrangements and changes, installations, disconnections and removals) for the 12 months preceding the cut-off date shall be used as a base in connection with the phase out of interstate allocation of customer premises equipment. For the month of January, 1983 such base amount shall be reduced by one-sixtieth and apportioned among the operations in accordance with the procedures set forth above in §§67.315(b)(1)-67.315(d)(2), as applicable.

(3) Each month thereafter, the base amount shall be reduced by one-sixtieth of the original base amount, and the apportionment of such reduced amount among the operations shall be made in a similar manner. After 60 months the base amount will be reduced to zero, and no apportionment of customer premises equipment maintenance expense to interstate operations shall thereafter be made.

(f) Inside Wiring Installation Expense—Expenses associated with the installation of inside wiring shall be apportioned between state and interstate operations in accordance with the applicable factor for the apportionment of investment in such wiring.

### §67.316 Repairs of Buildings and Grounds—Account 606

(a) The expense in this account is apportioned among the operations on the basis of the separation of the cost of buildings.

### §67.317 Repairs of Public Telephone Equipment—Account 607

(a) The amount in this account is allocated in the same manner as Public Telephone Equipment.

### §67.318 Maintaining Transmission Power—Account 610

(a) The expense in this account is apportioned among the operations on the basis of the separation of the cost of Central Office Equipment—Account 221.

### §67.319 Employment Stabilization—Account 611

(a) The expense in this account is apportioned among the operations on the basis of the separation of maintenance expenses in Accounts 602.1 through 610, inclusive.

### §67.320 Other Maintenance Expenses—Account 612

(a) If the amount in this account is substantial, the expenses are analyzed to determine the nature of the charges and apportioned among the operations as required, using appropriate methods. If the amount in this account is small, it is apportioned on the basis of maintenance expenses in Accounts 602.1 through 610, inclusive.

## DEPRECIATION AND AMORTIZATION EXPENSES

### §67.331 Depreciation—Account 608

(a) Depreciation expenses as accrued by plant accounts or subaccounts (except depreciation on Pole Lines—Account 241 and Underground Conduit—Account 244) are expressed as ratios of depreciation expense to the cost included in the corresponding plant account or subaccount.

(1) Depreciation expenses accrued for Pole Lines—Account 241 and Underground Conduit—Account 244 are expressed as ratios of depreciation expense to the total costs of Pole Lines—Account 241, and Underground Conduit—Account 244, respectively.

(2) Depreciation expense associated with customer premises equipment in Accounts 231 and 234 except Category 2 equipment for the month of December, 1982 shall be expressed as a ratio to the plant in these accounts as recorded for December 31, 1982, and such ratio shall be applied to the phase out of plant in these accounts as described in §67.153(b) in accordance with the procedure in §67.331(b).

(b) Depreciation expense is then apportioned among the operations by the application of the depreciation expense ratios so derived to the cost of the plant in each account or subaccount apportioned to each operation.

### §67.332 Extraordinary Retirements—Account 609

(a) Charges to this account are analyzed and apportioned among the operations by appropriate methods.

### §67.333 Amortization of Intangible Property—Account 613

(a) Charges to this account for amortization of leaseholds are apportioned among the operations on the basis of the separation of the cost of Land—Account 211.

(b) Charges to this account for other than amortization of leaseholds are apportioned among the operations on the basis of the separation of amounts included in Organization—Account 201, Franchises—Account 202, and Patent Rights—Account 203, combined.

### §67.334 Amortization of Telephone Plant Acquisition Adjustment—Account 614

(a) Amounts in this account are apportioned among the operations on the basis of the separation of amounts included in Telephone Plant Acquisition Adjustment—Account 100.4.

## TRAFFIC EXPENSES

### §67.341 General

(a) Traffic expenses are included in the following accounts:

| | |
|---|---|
| General Traffic Supervision | Account 621 |
| Service Inspection and Customer Instruction | Account 622 |
| Operators' Wages | Account 624 |
| Rest and Lunch Rooms | Account 626 |
| Operators' Employment and Training | Account 627 |
| Central Office Stationary and Printing | Account 629 |
| Central Office House Service | Account 630 |
| Miscellaneous Central Office Expenses | Account 631 |
| Public Telephone Expenses | Account 632 |
| Other Traffic Expenses | Account 633 |
| Joint Traffic Expenses - Dr. | Account 634 |
| Joint Traffic Expenses - Cr. | Account 635 |

(b) In general, traffic expenses are apportioned among the operations on the basis of the relative number of weighted standard work seconds. For this purpose, certain groups of weighted standard work seconds are apportioned among the operations as follows:

(1) Directory assistance weighted standard work seconds at separate auxiliary service boards are apportioned among the operations on the basis of the classification of these weighted standard work seconds as follows:

(i) Directory assistance weighted standard work seconds first are classified between calls received over toll directory assistance trunks from operators or customers and all other directory assistance calls.

(ii) The directory assistance weighted standard work seconds of each type further are classified separately among the operations on the basis of an analysis of a representative sample of directory assistance calls of each type with reference to the locations of the calling and called stations for each call.

(2) Intercept weighted standard work seconds in the study area are apportioned among the operations on the basis of the relative number of subscriber line minutes-of-use applicable to each operation in the study area.

(c) For some traffic expense accounts one set of factors is used to apportion the entire expense in the account among the operations. For other accounts the expense is segregated into two or more classifications and is apportioned separately for each classification. Some companies maintain subaccounts consistent with the specific classifications.

(d) Traffic expense in each account or classification is apportioned among the operations separately for each exchange except where:

(1) it is difficult to determine the expense for individual exchanges,

(2) some exchanges have relatively small amounts of expense, or

(3) some exchanges have comparable cost levels or comparable proportions of the operations.

Where any of the above conditions apply, the expense may be apportioned among the operations for groups of exchanges. A group of exchanges may include all exchanges in the study area.

(e) For the purpose of this section "total weighted standard work seconds" includes an allowance for TWX when allocation to TWX is necessary.

### §67.342 General Traffic Supervision—Account 621

(a) Engineering—The expense of employees engaged in traffic engineering is apportioned among the operations on the basis of the apportionment of the combined cost of Central Office Equipment—Account 221 and Interexchange Outside Plant in Accounts 241 through 244.

(b) Network Administration—The expense of employees engaged in traffic administration of dial switching equipment operations is apportioned among the operations on the basis of the apportionment of the cost of Central Office Equipment in Categories 1 through 7.

(c) All Other—All other expense included in this account is apportioned among the operations on the basis of the relative number of total weighted standard work seconds.

### §67.343 Service Inspection and Customer Instruction—Account 622

(a) The expense in this account is ordinarily segregated into four classifications or subaccounts: (1) service evaluation, (2) private branch exchange, (3) TWX, and (4) customer instruction and miscellaneous.

(b) Service Evaluation.

(1) This classification includes the expense of traffic service evaluation forces engaged in evaluating the handling of message telephone traffic, in summarizing service evaluation data, and in directly supervising such work.

(2) The expense is apportioned between exchange and toll for a study area on the basis of the relative number of exchange and toll service weighted evaluation seconds.

(3) The toll expense is then apportioned on a study area basis between state and interstate operations on the basis of the relative number of toll minutes of use for each operation.

(c) Private Branch Exchange

(1) This classification includes the expense of employees engaged in inspecting private branch exchange service and directly supervising such work. This includes the taking of observations of private branch exchange service, other than service observations by the regular service observing forces, and the expense of employment and instruction of private branch exchange operators when performed by the private branch exchange service organization.

(2) The expense in this classification for the study area is apportioned among the operations on the basis of relative amounts of current billing excluding billing to non-affiliated telegraph companies and other telephone companies as determined by an analysis for a representative period.

(d) Teletypewriter Exchange Service

(1) This classification includes the expense of employees engaged in inspecting or observing the handling of teletypewriter exchange service. It also includes the expense of training customers' personnel for such service.

(2) The expense in this classification for the study area is apportioned between state toll and interstate toll operations on the basis of the relative number of state and interstate TWX traffic units or weighted standard work seconds.

(e) Customer Instruction and Miscellaneous

(1) This classification includes the expense of employees engaged in instructing customers in methods of placing calls, in taking special observations in connection with the handling of individual service criticisms, and in similar activities.

(2) Expense in this classification for the study area is apportioned among the operations on the basis of the relative amounts of current billing excluding billing to other telephone companies as determined by an analysis for a representative period.

§67.344 Operators' Wages—Account 624

(a) For apportionment purposes, the following classifications of expense included in this account are considered: (1) private branch exchange, (2) teletypewriter exchange, (3) network administration, (4) number services record work, and (5) all other.

(b) Private Branch Exchange

(1) This classification includes the expense of private branch exchange operating and clerical employees.

**(2) Expense in this classification is first divided between that incurred in connection with the operation of private line service switchboards and all other.**

**(i) Expense incurred in connection with the operation of private line service switchboards is apportioned among the operations, by locations, on the same basis as that used for the apportionment of the cost of the private line service switchboards operated (See §67.139(e)).**

**(ii) All other expense in this classification for the study area is apportioned among the operations on the basis of the relative number of subscriber line minutes-of-use in the study area.**

(c) Teletypewriter Exchange

**(1) This classification includes the expense of teletypewriter exchange operating and clerical employees.**

**(2) Expense in this classification is apportioned between state toll and interstate toll operations, by locations, on the basis of the relative number of state and interstate TWX traffic units or weighted standard work seconds.**

(d) Network Administration

**(1) This classification includes the expense of switching administration, data administration, transmission administration, line and number administration, trunk administration and general administration and training for all of these functions.**

**(2) Expense in this classification for the study area is apportioned among the operations on the basis of the apportionment of Central Office Equipment in Categories 1 through 7.**

(e) Number Services Record Work

**(1) This classification includes the expense of updating and maintaining records for directory assistance, intercept, and calling card service functions.**

**(2) Expense in this classification is first divided between directory assistance, intercept, and calling card service for the study area.**

**(3) The expense incurred for the directory assistance function is apportioned among the operations for a study area on the basis of the weighted standard work seconds generated by the directory assistance offices in the study area.**

**(4) The expense incurred for the intercept function is apportioned among the operations for a study area on the basis of the weighted standard work seconds generated by the intercept offices in the study area.**

**(5) The expense incurred for the calling card service function is apportioned among the operations for a study area on the basis of the credit card messages for the study area.**

(f) All other

**(1) The expense in this classification is apportioned among the operations by exchanges or groups of exchanges on the basis of the relative number of weighted standard work seconds at each exchange or group of exchanges.**

**(i) Where an exchange has a separate toll payroll, or payrolls, the weighted standard work seconds consistent with the payroll, or payrolls, for each toll office are used to apportion the total expense for that office. The total weighted standard work seconds for all other offices may be used to apportion the totals of the separate payrolls for these other offices.**

§67.345 Rest and Lunch Rooms—Account 626

(a) Dining Service—This classification includes the expense of operating lunch rooms for traffic department central office employees. Included are salaries of employees engaged in the operation of lunch rooms, associated house service expense, expenditures for food supplies, and other miscellaneous related expense, less lunch room receipts. This expense is apportioned among the operations separately for each exchange or for groups of exchanges on the basis of the relative number of total weighted standard work seconds in the exchange or group of exchanges.

(b) All Other—The remaining expense in this account for the study area is apportioned among the operations on the basis of the relative number of telephone weighted standard work seconds plus TWX weighted standard work seconds or traffic units.

§67.346 Operators' Employment and Training—Account 627

(a) Teletypewriter Exchange Training—The expense of traffic employees, both instructors and trainees, incurred while attending a training course in TWX operating and clerical work is apportioned between state and interstate operations on the basis of the relative number of TWX weighted standard work seconds or traffic units for the study area.

(b) All other—The remaining expense in this account is apportioned among the operations separately for each switchboard, exchange or group of exchanges on the basis of the relative number of the telephone weighted standard work seconds applicable to each operation at the switchboard, exchange or group of exchanges. However, where significant proportions of both exchange traffic and outward toll traffic are handled at the same switchboard or group of switchboards, the weighted standard work seconds used for their apportionment must be additionally weighted. The weighting factors applied to the weighted standard work seconds for this purpose are derived by assigning a weight of one to all local operator weighted standard work seconds and an appropriate relative weight to all toll operator weighted standard work seconds. This toll weighing factor is based on periodic studies of the relative training requirements.

§67.347 Central Office Stationery and Printing—Account 629; Central Office House Service—Account 630; Miscellaneous Central Office Expenses—Account 631

(a) The expense in Accounts 629 and 630 for the study area is apportioned among the operations on the basis of the relative number of total weighted standard work seconds.

(b) The expense in Account 631 is apportioned among the operations separately for each exchange or group of exchanges on the basis of the relative number of total weighted standard work seconds in the exchange or group of exchanges.

§67.348 Public Telephone Expenses—Account 632

(a) The expense incurred at attended pay stations handling toll to completion is assigned to toll, and is apportioned between state and interstate operations on the basis of the relative number of state toll and interstate toll weighted standard work seconds at each location.

(b) The remaining expense in this account for the study area is apportioned among the operations on the basis of the relative number of study area subscriber line minutes-of-use.

§67.349 Other Traffic Expenses—Account 633

(a) Settlement Amounts—Amounts of settlements for traffic operating services performed by other companies are apportioned among the operations on bases consistent with the nature of the operating services.

(b) All Other—All other expense in this account for the study area is apportioned among the operations on the basis of the relative number of total weighted standard work seconds for the study area.

### §67.350 Joint Traffic Expenses—Dr.—Account 634; Joint Traffic Expenses—Cr.—Account 635

(a) Amounts in these accounts are apportioned among the operations on bases consistent with the nature of the traffic operating services received or provided.

## COMMERCIAL EXPENSES

### §67.361 General

(a) Commercial expenses are included in the following accounts:

| | |
|---|---|
| General Commercial Administration | Account 640 |
| Advertising | Account 642 |
| Sales Expense | Account 643 |
| Connecting Company Relations | Account 644 |
| Local Commercial Operations | Account 645 |
| Public Telephone Commissions | Account 648 |
| Directory Expenses | Account 649 |
| Other Commercial Expenses | Account 650 |

### §67.362 General Commercial Administration—Account 640

(a) General commercial administration expense is apportioned among the operations on the basis of the apportionment of Sales Expense—Account 643, Connecting Company Relations—Account 644, and Local Commercial Operations—Account 645, combined.

### §67.363 Advertising—Account 642
### Sales Expense—Account 643

(a) The expenses in these accounts are apportioned among the operations on the basis of an analysis of current billing for local and toll services during a representative period. This analysis excludes current billing for non-affiliated telegraph companies and billing in connection with intercompany settlements.

### §67.364 Connecting Company Relations—Account 644

(a) The expense in this account is first assigned to: message toll telephone service including WATS access; TWX service; private line services; and extended area services (EAS) on the basis of an analysis during a representative period of the net settlement amounts associated with each of these services. This analysis excludes settlements with affiliated telephone companies and with non-affiliated telegraph companies.

(1) Message toll telephone service expense is apportioned between state toll and interstate toll operations on the basis of an analysis of current billing for state and interstate joint toll messages, respectively, sent paid and received collect, underlying the related intercompany settlements.

(2) TWX service expense is apportioned between state and interstate operations on the basis of an analysis of the current billing for state and interstate TWX connections, respectively, handled on a sent paid and received collect basis, underlying the related intercompany settlements.

(3) Private line services expenses are apportioned among the operations on the basis of the net settlement amounts for the private line services involved.

(4) Extended area service (EAS) expense is directly assigned to the exchange operation.

§67.365 Local Commercial Operations—Account 645

(a) The expense in this account for the area under study is first segregated on the basis of the relative number of users of the following services: message toll and telegram; exchange, including semi-public; directory advertising; TWX and private line services, as determined by an analysis for a representative period. An individual subscriber may be classed as more than one user, this being determined by the number of services used.

(1) Message toll and telegram expense is further segregated between message toll and telegram on the basis of the relative number of sent paid and received collect messages billed company customers in the area under study, excluding messages at coin and company attended telephones, as determined by an analysis for a representative period.

(i) Message toll expense is apportioned between state toll and interstate toll operations on the basis of the relative number of business office contacts relating to state toll and interstate toll messages.

(ii) Telegram expense is assigned to the exchange operation.

(2) Exchange, including semi-public, and directory advertising expenses are assigned to the exchange operation.

(3) TWX expense is apportioned between state toll and interstate toll operations on the basis of the relative number of sent paid and received collect TWX connections billed by the company in the study area.

(4) Private line services expenses are apportioned among the operations on the basis of the relative number of private line service accounts, as determined by an analysis for a representative period.

§67.365 Public Telephone Commissions—Account 648

(a) The expense in this account, including commissions paid hotels, is apportioned among the operations on the basis of a special study of commissions paid during a representative period.

§67.367 Directory Expenses—Account 649

(a) The expense in this account is apportioned among the operations on the basis of analyses of Prepaid Directory Expenses—Account 132 for representative periods. In making these analyses, the expenses are assigned as follows:

(1) Classified directory expense and all expense of soliciting advertising is assigned to the exchange operation.

(2) TWX directory expense is assigned to state toll and interstate toll operations, respectively, on the basis of the relative number of TWX minutes-of-use.

(3) The expense of alphabetical and street address directories and traffic information records is apportioned among the operations on the basis of the

relative number of study area subscriber line minutes-of-use applicable to each operation.

(4) The expense associated with directories and traffic information records prepared for one locality and used in another locality is known as "foreign directories expense." Such expense is assigned to the appropriate operation on the basis of the location of the point where used with respect to the locality for which the directories and records were prepared.

(b) The amounts of Prepaid Directory Expenses apportioned to each of the operations as set forth in §67.367(a) are summarized and expressed as percentages of the total.

(c) The percentages developed as set forth in §67.367(b) are applied to Directory Expenses—Account 649 for the separation period under study to apportion the expense in this account among the operations.

### §67.368 Other Commercial Expenses—Account 650

(a) The expense in this account is apportioned among the operations on the basis of the apportionment of all other commercial expenses combined.

## REVENUE ACCOUNTING EXPENSES

### §67.381 General

(a) Revenue accounting expenses comprise the salaries and other expenses in Account 662 directly assignable or allocable to the billing of customers and the accounting for revenues, including the supervision of such work.

(1) The expenses for those general accounting administrative employees engaged in administrative, developmental methods, and personnel work which can not be directly assigned to the revenue accounting function or to other accounting functions are apportioned to revenue accounting on the basis of an analysis of the employee hours for the revenue accounting function and for all other accounting department functions.

(b) Revenue accounting expenses for the study area are segregated into five main classifications as follows: toll ticket processing expense; local message processing expense; other billing and collecting processing expense, including postage expense associated with customer bills; end user common line access charge billing expense; and other access charge billing expense.

(1) Total revenue accounting expense, including the general accounting administrative expense associated with the revenue accounting function, less the expense of postage associated with customer bills, is allocated among the five main classifications on the basis of an analysis of the hours of productive work in each classification for a representative period. The postage expense associated with customer bills is then included with the expense allocated to the other billing and collecting processing classification.

(c) As used in this Section, the term "ticket" denotes either a ticket prepared manually by an operator or the mechanized equivalent of such a ticket processed by the revenue accounting office.

### §67.382 Toll Ticket Processing Expense

(a) This classification includes the salary expense and the machine expense of data processing equipment, including supervision, general accounting administrative, and miscellaneous expense, associated with the processing of individual toll tickets. It includes work such as that associated with the receiving and rating of message toll telephone tickets, the preparation of toll service statements, and with the processing of intercompany message toll telephone and telegram settlements.

(b) The expenses assigned to this classification are apportioned among the operations on the basis of the relative number of state message toll telephone messages and TWX connections, weighted interstate message toll telephone messages and TWX connections, and nonaffiliated company telegram messages. Interstate toll tickets are weighted, if appropriate, to reflect the generally greater amounts of work involved in processing such tickets. In this apportionment, telegram messages are treated as exchange.

### §67.383 Local Message Processing Expense

(a) This classification includes the salary expense and the machine expense of data processing equipment, including supervision, general accounting administrative, and miscellaneous expense, associated with the processing of local message tickets and local unit register readings. The expense in this classification is assigned to the exchange operation.

### §67.384 Other Billing and Collecting Processing Expense

(a) This classification includes the salary expense and the machine expense of data processing equipment, including supervision, general accounting administrative, and miscellaneous expense, associated with the preparation of customer bills other than access charge bills and with other revenue accounting functions not covered in §67.382 and §67.383. Included in this classification are the expenses incurred in the preparation of monthly bills, initial and final bills, the application of service orders to billing records, (establishing, changing, or discontinuing customers' accounts) station statistical work, controlling record work and the preparation of revenue reports.

(b) The expenses assigned this classification are segregated on the basis of the relative number of users of the following services: message toll telephone and telegram (excluding semi-public where tolls are not itemized on the bill); TWX; exchange including semi-public; directory advertising; and private line services, as determined by analysis for a representative period. In determining the number of users, an individual customer is counted once for each class of service which he uses; for example a majority of customers are counted both as message toll telephone and telegram users and as exchange users.

(1) Expense allocated to message toll telephone and telegram users is apportioned among the operations on the basis of the relative number of non-affiliated company telegram messages, state message toll telephone messages, and interstate message toll telephone messages. In this apportionment, telegram messages are treated as exchange.

(2) Expense allocated to TWX users is apportioned between state and interstate operations on the basis of the relative number of TWX connections.

(3) Expenses allocated to exchange, including semi-public users, and to directory advertising users are assigned to the exchange operation.

(4) Expense allocated to private line services users is apportioned among the operations on the basis of the relative number of interstate and intrastate private line service accounts, as determined by analysis for a representative period.

### §67.385 End User Common Line Access Charge Billing Expense

(a) If end user common line charges for intrastate toll access are assessed in a particular state, one-half of the end user common line access charge billing expense shall be apportioned to the interstate operations. If no end user common line charge is assessed for intrastate toll access, all of the end user common line access charge billing expense shall be assigned to interstate operations.

### §67.386 Other Access Charge Billing Expense

(a) If access charges other than end user common line access charges are assessed for the origination or termination of intrastate services in a particular state, one-half of such expense shall be apportioned to interstate operations. If no such access charges are assessed in a particular state, all such expense shall be assigned to interstate operations.

## GENERAL EXPENSES

### §67.391 General

(a) General expenses are included in the following accounts:

| | |
|---|---|
| Executive Department | Account 661 |
| Accounting Department | Account 662[4] |
| Treasury Department | Account 663 |
| Law Department | Account 664 |
| Other General Office Salaries and Expenses | Account 665 |
| Insurance | Account 668 |
| Accidents and Damages | Account 669 |
| Other Expenses | Account 675 |
| Expenses Charged Construction - Cr. | Account 677 |

### §67.392 Apportionment Procedures

(a) The expenses in these accounts are segregated into two groups and apportioned among the operations as follows:

(1) The first group consists of expenses included in Accounts 661, 662, 663, 664, 665 and 677, excluding the revenue accounting expense portion of Account 662 and the engineering expense portion of Account 665. Expenses in this group are apportioned among the operations on the basis of the separation of the wage portion of maintenance, traffic, commercial and revenue accounting expenses, excluding the wage portion of the maintenance expenses related to general office space. The wage portion of maintenance expense related to maintenance of customer premises equipment shall be determined in a manner consistent with the phase out of maintenance expense provided in §67.315(e).

(2) The second group consists of the expenses included in Accounts 668, 669, the engineering expense portion of Account 665 and the expenses included in Account 675, excluding extended area services (EAS) settlements, which are directly assigned to the exchange operation. Expenses in this group are apportioned among the operations on the basis of the separation of the cost of Telephone Plant in Service—Account 100.1, excluding the cost of plant assigned general office space and costs included in Accounts 201, 202, 203, 276 and 277.

## OTHER OPERATING EXPENSES

### §67.401 General

(a) Other operating expenses are included in the following accounts:

| | |
|---|---|
| Operating Rents | Account 671 |
| Relief and Pensions | Account 672 |

---

[4] Excluding Revenue Accounting Expenses (See Subpart D, Revenue Accounting Expenses.

| | |
|---|---|
| Telephone Franchise Requirements | Account 673 |
| General Services and Licenses | Account 674 |
| Telephone Franchise Requirements - Cr. | Account 676 |

## §67.402 Operating Rents—Account 671

(a) Except where property obtained from affiliates is treated as owned property by the company making the separation and the related operating rents are excluded from the separations studies, as set forth in §67.2(c), amounts in this account are apportioned among the operations on bases generally consistent with the treatment prescribed for similar plant costs and consistent with the relative magnitude of the items involved.

## §67.403 Relief and Pensions—Account 672

(a) The expense in this account is apportioned among the operations on the basis of the separation of the wage portion of maintenance, traffic, commercial and revenue accounting expenses.

## §67.404 Telephone Franchise Requirements—Account 673

(a) Amounts charged to this account are apportioned among the operations on the basis of the separation of the cost of Telephone Plant In Service—Account 100.1.

## §67.405 General Services and Licenses—Account 674

The expense in this account is apportioned among the operations on a basis consistent with the method employed in determining such expense.

## §67.406 Telephone Franchise Requirements—Cr.—Account 676

(a) Amounts credited to this account, representing charges for telephone service which would have been made at standard rates, are assigned to the exchange operation.

(b) Amounts credited to this account, representing rental value of conduit space, are apportioned among the operations on the basis of the separation of the cost of Underground Conduit—Account 244.

## TAXES

## §67.411 General

(a) Taxes are included in the following accounts:

| | |
|---|---|
| Federal Income Taxes - Operating | Account 306 |
| Other Operating Taxes | Account 307 |
| Operating Federal Income Taxes Deferred; Accelerated Tax Depreciation | Account 308 |
| Income Credits Resulting from Prior Deferrals of Federal Income Taxes | Account 309 |
| Federal Income Taxes - Non-operating | Account 326 |
| Other Non-operating Taxes | Account 327 |
| Income Tax Effect of | |

| | |
|---|---|
| Extraordinary and Delayed<br>Items - Net ........................................ | Account 380 |

(b) The above accounts include federal, state, county, municipal and other taxes related to telephone plant, operations and privileges. They are apportioned among the operations as described in the following sections.

§67.412 Income Taxes—Federal—Account 306, State and Local—Account 307

(a) If a company is subject to local or state taxes on net income as well as to federal taxes based on net income, the taxes are treated separately, since the local or state taxes are deductible in the computation of the federal taxes.

(b) In the apportionment among the operations of local, state, or federal net income taxes, the first step is to determine the amount of taxes attributable to the operations. This amount is obtained by subtracting from the total taxes based on net income, the tax components (positive or negative) attributable to other than the operations.

(c) The tax component attributable to the fixed charges on non-operating investments is treated as non-operating. The fixed charges on non-operating investments are that proportion of total fixed charges which non-operating net investments are of total operating and non-operating net investments.

(d) The second step is to apportion among the operations the net income tax (positive or negative) attributable to all operations on the basis of the approximate net taxable income (positive or negative) applicable to each of the operations. The approximate net taxable income from each of the operations is the summation of the following amounts apportioned to each operation by means of the procedures set forth in this manual:

(1) Operating revenues,

(2) Less operating expenses,

(3) Less operating taxes except the net income tax being apportioned and except any other tax not treated as a deductible item in the determination of taxable net income for this purpose,

(4) Less operating fixed charges,

(5) Plus or minus, as appropriate, any miscellaneous items attributable to the operations which are not included in the foregoing, but which enter into the determination of the net income tax being apportioned.

(e) Operating fixed charges, i.e., total fixed charges less the portion applicable to non-operating investments determined as set forth in §67.412(c), are apportioned among the operations on the basis of the separation of the cost of telephone plant, less appropriate reserves.

(f) If the tax to be apportioned among the operations is zero, i.e., there being neither a positive nor a negative tax, an approximate net taxable income (positive or negative) should be computed as above for each operation. The appropriate tax rate should be applied to any operations having positive net taxable income to determine the amount of tax assignable thereto. A negative amount, equal to the total apportioned to the operations having positive net taxable incomes, should be apportioned to the other operations on the basis of their respective negative net taxable incomes.

§67.413 Other Operating Taxes—Account 307

(a) Property Taxes—These taxes are apportioned among the operations on either (1) the basis of the separation of the cost of Telephone Plant In Service—Account 100.1 or (2) the basis of the separation of the cost of the property in the subdivision of Account

**100.1 related to the tax. The latter apportionment shall be employed only in instances where property taxes are levied on portions of Telephone Plant In Service.**

**(b) Gross Receipt Taxes—These taxes are apportioned among the operations on the basis of the separation of the receipts, earnings or income on which the taxes are levied.**

**(c) Capital Stock Taxes—These taxes, after adjustment to exclude any amounts applicable to non-operating investments, are apportioned among the operations on the basis of the separation of the cost of Telephone Plant In Service—Account 100.1.**

**(d) Social Security Taxes—These taxes are apportioned among the operations on the basis of the separation of the wage portion of maintenance, traffic, commercial and revenue accounting expenses.**

**(e) Other Taxes—These taxes are apportioned among the operations on the basis of the separation of the cost of Telephone Plant In Service—Account 100.1.**

### §67.414 Accelerated Depreciation; Income Tax Deferrals and Credits—Accounts 307, 308, 309

**(a) Amounts in these accounts are maintained by plant accounts and are apportioned among the operations on the basis of the separation of the related plant account.**

### §67.415 Operating Portion of Other Income Tax Account—Accounts 326, 327, and 380

**(a) The portion of taxes (positive or negative) in these accounts attributable to the operations is apportioned among the operations in the same manner as described in §67.412.**

## Subpart E - Reserves

### §67.501 General

**(a) Reserves are included in the following accounts:**

| | |
|---|---|
| **Depreciation Reserve ....................................** | **Account 171** |
| **Amortization Reserve ....................................** | **Account 172** |
| **Acumulated Deferred Income<br>Taxes - Accelerated Tax<br>Depreciation ....................................** | **Account 176** |

### §67.502 Depreciation Reserve—Account 171

**(a) The depreciation reserve applicable to the total depreciable property is first allocated to plant accounts. Where such amounts are not available from the books of the company, this allocation is made on the basis of a determination of the straightline reserve theoretically applicable to the respective accounts. Each amount so allocated is then apportioned among the operations on the basis of the separation of the related plant account.**

**(b) The depreciation reserve associated with customer premises equipment in Accounts 231 and 234 except Category 2 equipment shall be determined as of December 31, 1982 as a base for the phase out of customer premises equipment in those accounts. Starting with January, 1983 such base amount shall be reduced by one-sixtieth each month. Each amount so determined is then apportioned among the operations in accordance with the procedures used for the separation of the related CPE investment.**

§67.503 Amortization Reserve—Account 172

(a) Amounts in this account are first allocated to the property accounts with which they are associated. Each amount so allocated is then apportioned among the operations on the basis of the separation of the related property account.

§67.504 Accumulated Deferred Income Taxes—Accelerated Tax Depreciation—Account 176

(a) Amounts in this account are maintained by plant accounts and are apportioned among the operations on the basis of the separation of the related plant account.

## Subpart F—Universal Service Factor

### GENERAL

§67.601 General

(a) For purposes of §69.501(a) of the Rules of the Federal Communications Commission, the Universal Service Factor portion of the interstate apportionment shall consist of an expense adjustment computed in accordance with this Section. The expense adjustment will be added to interstate expenses and deducted from state expenses after expenses and taxes have been apportioned pursuant to Subpart D.

(b) The expense adjustment will be computed on the basis of data for a preceding calendar year which may be updated at the option of the carrier pursuant to §67.612(a).

### DATA COLLECTION

§67.611 Submission of Information to the National Exchange Carrier Association

(a) In order to allow determination of the study areas which are entitled to an expense adjustment each local telephone company must provide the National Exchange Carrier Association established pursuant to Part 69 of the Commission's Rules with the information listed below for each of its study areas. This information is to be filed with the Association on June 30th of each year beginning in 1984. The information filed on June 30th of each year after 1984 will be used in the jurisdictional allocations underlying the cost support data for the access charge tariffs to be filed the following October.

(1) Unseparated, *i.e.*, state and interstate, gross plant investment in Outside Subscriber Line Plant (OSP) Category 1.33, and COE Category 8.13 (in both cases excluding plant associated with WATS access lines). This amount shall be calculated as of December 31st of the year preceding each June filing.

(2) Unseparated depreciation reserve and accumulated deferred federal income taxes attributable to OSP Category 1.33 investment, and COE Category 8.13 investment (in both cases excluding investment associated with WATS access lines). These amounts shall be calculated as of December 31st of the year preceding each June filing, and shall be stated separately.

(3) Unseparated depreciation expense attributable to OSP Category 1.33 investment, and COE Category 8.13 investment (in both cases excluding investment associated with WATS access lines). This amount shall be the actual depreciation expense for the calendar year preceding each June filing.

(4) Unseparated maintenance expense attributable to OSP Category 1.33 investment and COE Category 8.13 investment (in both cases excluding investment associated with WATS access lines). This amount shall be the actual maintenance expense for the calendar year preceding each June filing.

(5) Unseparated general expenses, other operating expenses in Accounts 671, 672

and 674, and taxes. The amount for each of these categories of expense shall be the actual amount for that expense for the calendar year preceding each June filing. The amount for each category of expense listed shall be stated separately.

(6) Unseparated gross telephone plant investment. This amount shall be calculated as of December 31st of the year preceding each June filing.

(7) Unseparated depreciation reserve and accumulated deferred federal income taxes attributable to total unseparated telephone plant investment. This amount shall be calculated as of December 31st of the year preceding each June filing.

(8) The number of working subscriber line outside loops used jointly for non-wideband exchange and message telephone service, excluding WATS access lines and TWX service, but including subscriber line outside plant associated with pay telephones. (OSP Category 1.33 excluding WATS access lines and TWX service) This figure shall be calculated as of December 31st of the year preceding each June filing.

(9) The embedded cost of debt and the debt/equity ratio as of December 31st of the year preceding each June filing.

## §67.612 Updating Information Submitted to the National Exchange Carrier Association

(a) Any telephone company may update the information submitted to the National Exchange Carrier Association pursuant to §§67.611(a)(1) through 67.611(a)(9) one or more times annually on a rolling year basis. Carriers wishing to update the preceding calendar year data filed June 30th may (1) submit data covering the last nine months of the previous calendar year and the first three months of the existing calendar year no later than September 30th of that year; (2) submit data on the last six months of the previous calendar year and the first six months of the existing year no later than December 30th of the existing year; and/or (3) submit data on the last three months of the second preceding calendar year and the first nine months of the preceding calendar year no later than March 30th of the existing year.

## CALCULATION OF LOOP COSTS FOR EXPENSE ADJUSTMENT

## §67.621 National and Study Area Average Unseparated Loop Cost Per Working Loop

(a) Study Area Unseparated Loop Cost. For the purposes of calculation of the expense adjustment, the study area unseparated loop cost is equal to the sum of the following:

(1) Return component for net unseparated OSP Category 1.33 investment, and COE Category 8.13 investment (in both cases excluding investment associated with WATS access lines). This amount is calculated by deducting the depreciation reserve and accumulated deferred federal income taxes attributable to OSP Category 1.33 investment and COE Category 8.13 investment (in both cases excluding investment associated with WATS access lines) reported pursuant to §67.611(a)(2) from the gross plant investment in OSP Category 1.33, and COE Category 8.13 (in both cases excluding plant associated with WATS access lines) reported pursuant to §67.611(a)(1) to obtain the net unseparated OSP Category 1.33 investment, and COE Category 8.13 investment (in both cases excluding investment associated with WATS access lines). The net unseparated OSP Category 1.33 investment, and COE Category 8.13 investment (in both cases excluding investment associated with WATS access lines) is multiplied by the study area's cost of capital. The cost of capital is calculated by multiplying the embedded cost of debt times the percent of the total capital that is debt and adding to this amount the product of the authorized interstate rate of return on

equity times the percent of total capital that is equity as this information is reported in §67.611(a)(9).

(2) Depreciation expense attributable to OSP Category 1.33 investment, and COE Category 8.13 investment (in both cases excluding amounts associated with WATS access lines) as reported in §67.611(a)(3).

(3) Maintenance expense attributable to OSP Category 1.33 investment, and COE Category 8.13 investment (in both cases excluding amounts associated with WATS access lines) as reported in §67.611(a)(4).

(4) General, other expenses and taxes attributable to OSP Category 1.33 investment, and COE Category 8.13 investment (in both cases excluding amounts associated with WATS access lines). This amount equals the net unseparated OSP Category 1.33 investment, and COE Category 8.13 investment (in both cases excluding amounts associated with WATS access lines) as calculated in §67.621(a)(1) multiplied by the unseparated general and other expenses and taxes as reported in §67.611(a)(5) divided by the unseparated net investment for total telephone plant for the study area. The unseparated net investment for total telephone plant for the study area equals the unseparated gross telephone plant investment as reported in §67.611(a)(6) minus the unseparated depreciation reserve and accumulated deferred federal income taxes attributable to total telephone plant as reported in §67.611(a)(7).

### §67.622 National and Study Area Average Loop Cost Per Loop.

(a) National Average Unseparated Loop Cost Per Working Loop. This is equal to the sum of the unseparated loop costs for each study area in the country as calculated pursuant to §67.621(a) divided by the sum of the working loops reported in §67.611(a)(8) for each study area in the country. The national average unseparated loop cost per working loop shall be calculated by the National Exchange Carrier Association.

(1)(i) The national average unseparated loop cost per working loop shall be recalculated by the National Exchange Carrier Association to reflect the optional September, December and March update filings.

(ii) Each new nationwide average shall be used in determining the additional interstate expense allocation for companies which made update filings by the most recent filing date.

(iii) The calculation of a new national average to reflect the update filings shall not affect the amount of the additional interstate expense allocation for companies which did not make an update filing by the most recent filing date.

(b) Study Area Average Unseparated Loop Cost Per Working Loop. This is equal to the unseparated loop cost for the study area as calculated pursuant to §67.621(a) divided by the number of working loops reported in §67.611(a)(8) for the study area.

(1) If a company elects to update the data which it has filed with the National Exchange Carrier Association as provided in §67.612(a), the study area average unseparated loop cost per working loop and the amount of its additional interstate expense allocation shall be recalculated to reflect the updated data.

## CALCULATION OF EXPENSE ADJUSTMENT—ADDITIONAL INTERSTATE EXPENSE ALLOCATION

### §67.631 Expense Adjustment

(a) The expense adjustment (additional interstate expense allocation) is equal to the sum of the following:

(1) Fifty percent of the study area average unseparated loop cost per working loop as calculated pursuant to §67.622(b) in excess of 115 percent of the national average for this cost but not greater than 160 percent of the national average for this cost as calculated pursuant to §67.622(a) multiplied by the number of working loops reported in §67.611(a)(8) for the study area.

(2) Sixty percent of the study area average unseparated loop cost per working loop as calculated pursuant to §67.622(b) in excess of 160 percent of the national average for this cost, but not greater than 200 percent of the national average for this cost as calculated pursuant to §67.622(a) multiplied by the number of working loops reported in §67.611(a)(8) for the study area.

(3) Seventy percent of the study area average unseparated loop cost per working loop as calculated pursuant to §67.622(b) in excess of 200 percent of the national average for this cost, but not greater than 250 percent of the national average for this cost as calculated pursuant to §67.622(a) multiplied by the number of working loops reported in §67.611(a)(8) for the study area.

(4) Seventy-five percent of the study area average unseparated loop cost per working loop as calculated pursuant to §67.622(b) in excess of 250 percent of the national average for this cost as calculated pursuant to §67.622(a) multiplied by the number of working loops reported in 67.611(a)(8) for the study area.

## TRANSITIONAL EXPENSE ADJUSTMENT

### §67.641 Transition

(a) The expense adjustment for 1989 and subsequent years shall be the amount computed in accordance with §67.631.

(b) No expense adjustment shall be made prior to 1986.

(c) The expense adjustments for 1986 through 1988 shall be as follows:

(1) One-fourth of the amount computed in accordance with §67.631 in 1986;

(2) One-half of the amount computed in accordance with §67.631 in 1987; and

(3) Three-fourths of the amount computed in accordance with §67.631 in 1988.

## Subpart G—Glossary

## GLOSSARY

The descriptions of terms in this glossary are broad and have been prepared to assist in understanding the use of such terms in the separation procedures. Terms which are defined in the text of this Part are not included in this glossary.

Access line—A communication facility extending from a customer premises to a serving central office comprising a subscriber line and, if necessary, a trunk facility, e.g., WATS access line, TWX access line.

Book cost—The cost of property as recorded on the books of a company.

Cable fill factor—The ratio of cable conductor or cable pair miles in use to total cable conductor or cable pair miles available in the plant, e.g., the ratio of revenue producing cable pair miles in use to total cable pair miles in plant.

Category—A grouping of items of property to facilitate the apportionment of their costs among the operations and to which, ordinarily, a common measure of use is applicable.

Central office—A switching unit, in a telephone system which provides service to the general public, having the necessary equipment and operating arrangements for terminating and interconnecting subscriber lines and trunks or trunks only. There may be more than one central office in a building.

Channel—An electrical path suitable for the transmission of communications between two or more points, ordinarily between two or more stations or between channel terminations in Telephone Company central offices. A channel may be furnished by wire, radio or a combination thereof.

Circuit—A fully operative communications path established in the normal circuit layout and currently used for message, including WATS access, TWX, or private line services.

Circuit mileage or miles—The route miles of revenue producing circuits in service, determined by measuring the length, in terms of miles, of the actual path followed by the transmission medium.

Complement (of cable)—A group of conductors of the same general type (e.g., quadded, paired) within a single cable sheath.

Complex—All groups of operator positions, wherever located, associated with the same call distribution and/or stored program control unit.

Concentrating unit (TWX)—An arrangement of central office equipment wherein traffic over a number of TWX circuits is automatically concentrated onto a lesser number of circuits between the concentrating unit and its associated TWX switching office.

Concentration Equipment—Central office equipment whose function is to concentrate traffic from subscriber lines onto a lesser number of circuits between the remotely located concentration equipment and the serving central office concentration equipment. This concentration equipment is connected to the serving central office line equipment.

Conversation-minute-miles—The product of (a) the number of messages, (b) the average minutes of conversation per message and (c) the average route miles of circuits involved.

Cost—The cost of property owned by the Telephone Company whose property is to be apportioned among the operations. This term applies either to property costs recorded on the books of the company or property costs determined by other evaluation methods.

Current billing—The combined amount of charges billed, excluding arrears.

Customer dialed charge traffic—Traffic which is both (a) handled to completion through pulses generated by the customer and (b) for which either a message unit charge, bulk charge, or message toll charge is made, except for that traffic recorded by means of message registers.

Customer Premises Equipment—Items of telecommunications terminal equipment in Accounts 231 and 234 referred to as CPE in Section 64.702 of the Federal Communications Commission's Rules adopted in the *Second Computer Inquiry* such as telephone instruments, data sets, dialers and other supplemental equipment, and PBXs which are provided by common carriers and located on customer premises and inventory included in these accounts to be used for such purposes. Excluded from this classification are similar items of equipment located on telephone company premises and used by the company in the normal course of business as well as over voltage protection equipment, inside wiring, coin operated, public or pay telephones, multiplexing equipment to deliver multiple channels to the customer, mobile radio equipment and transmit earth stations.

DSA board—A local dial office switchboard at which are handled assistance calls, intercepted calls and calls from miscellaneous lines and trunks. It may also be employed for handling certain toll calls.

DSB board—A switchboard of a dial system for completing incoming calls received from manual offices.

Data processing equipment—Office equipment such as that using punched cards, punched tape, magnetic or other comparable storage media as an operating vehicle for recording and processing information. Includes machines for transcribing raw data into punched cards, etc. but does not include such items as key-operated, manually or electrically driven adding, calculating, bookkeeping or billing machines, typewriters or similar equipment.

Dial switching equipment—Switching equipment actuated by electrical impulses generated by a dial or key pulsing arrangement.

Equivalent gauge—A standard cross section of cable conductors for use in equating the metallic content of cable conductors of all gauges to a common base.

Equivalent miles of 104 wire—The basic units employed in the allocation of pole line costs for determining the relative use made of poles by aerial cables and by aerial wire conductors of various sizes. This unit reflects the relative loads of such cable and wire carried on poles.

Equivalent pair miles—The product of the sheath miles and the number of equivalent gauge pairs of conductors in a cable.

Equivalent sheath miles—The product of (a) the length of a section of cable in miles (sheath miles) and (b) the ratio of the metallic content applicable to a particular group of conductors in the cable (e.g., conductors assigned to a category) to the metallic content of all conductors in the cable.

Exchange circuit plant—This is a combination of (a) exchange outside plant, (b) exchange circuit equipment, including associated land and buildings and (c) station equipment.

Holding time—The time in which an item of telephone plant is in actual use either by a customer or an operator. For example, on a completed telephone call, holding time includes conversation time as well as other time in use. At local dial offices any measured minutes which result from other than customer attempts to place calls (as evidenced by the dialing of at least one digit) are not treated as holding time.

Host Central Office—An electronic analog or digital base switching unit containing the central call processing functions which service the host office and its remote locations.

Interexchange channel—The portion of a private line circuit which is included in the interexchange circuit plant.

Interexchange circuit plant—The combination of (a) interexchange outside plant and (b) interexchange circuit equipment, including associated land and buildings.

Interlocal trunk—A circuit between two local central office units, either manual or dial. Interlocal trunks may be used for either exchange or toll traffic or both.

Intertoll circuits—Circuits between toll centers and circuits between a toll center and a long haul tandem system in a different toll center area.

Local channel—The portion of a private line circuit which is included in the exchange circuit plant. However, common usage of this term usually excludes station equipment.

Local office—A central office serving primarily as a place of termination for subscriber lines and for providing telephone service to the subscribers on these lines.

Long haul toll traffic—A general term applied to message toll traffic between distant points. In common usage, this term is ordinarily applied to message toll traffic between points more than 20 to 50 miles apart.

Loop—A pair of wires, or its equivalent, between a customer's station and the central office from which the station is served.

Message—A completed call, i.e., a communication in which a conversation or exchange of information took place between the calling and called parties.

Message service—Switched service furnished to the general public (as distinguished from private line service). This includes exchange switched services and all switched services provided by interexchange carriers and completed by a local telephone company's access services, e.g., open-end FX and CCSA/ONALs, MTS, WATS, Execunet.

Message unit—Unit of measurement used for charging for measured message telephone exchange traffic within a specified area.

Metropolitan service area—The area around and including a relatively large city and in which substantially all of the message telephone traffic between the city and the suburban points within the area is classified as exchange in one or both directions.

Minutes of use—A unit of measurement expressed as either holding time or conversation time.

Minutes-of-use-miles—The product of (a) the number of minutes of use and (b) the average route miles of the circuits involved.

Multi-center exchange—An exchange area in which are located two or more local central office buildings or wire centers.

Operations—The term denoting the three general classifications of services rendered to the public for which separate tariffs are filed, namely, exchange, state toll and interstate toll.

Operator trunks—A general term, ordinarily applied to trunks between manually operated switchboard positions and local dial central offices in the same wire center.

Private Line Service—A service for communications between specified locations for a continuous period or for regularly recurring periods at stated hours.

Remote Access Line—An access line (e.g., for WATS or TWX service) between a subscriber's premises in one toll rate center and a serving central office located in a different toll rate center.

Remote Line Location—A remotely located subscriber line access unit which is normally dependent upon the central processor of the host office for call processing functions.

Remote Trunk Arrangement (RTA)—Arrangement that permits the extension of TSPS functions to remote locations.

Reservation—That amount or quantity of property kept or set apart for a specific use.

Reserved—Kept or set apart for a specific use.

Separations—The process by which telephone property costs, revenues, expenses, taxes and reserves are apportioned among the operations.

Service observing unit—A unit of work measurement which is used as the common denominator to express the relative time required for handling the various work functions at service observing boards.

Sheath miles—The actual length of a cable in route miles.

Short haul toll traffic—A general term applied to message toll traffic between nearby points. In common usage, this time is ordinarily applied to message toll traffic between points less than 20 to 50 miles apart.

Special services—All services other than message telephone, e.g., teletypewriter exchange service (TWX), private line services.

Station-to-Station basis—The term applied to the basis of toll rate making which contemplates that the message toll service charge (telephone or TWX) covers the use made of all facilities between the originating station and the terminating station, including the stations, and the services rendered in connection therewith.

Study Area—A telephone holding company's operations within a single state.

Subscriber line—A communication channel between a telephone station, P.B.X. or TWX station and the central office which serves it.

Subtributary office—A class of tributary office which does not have direct access to its toll center, but which is connected to its toll center office by means of circuits which are switched through to the toll center at another tributary office.

Tandem area—The general area served by the local offices having direct trunks to or from the tandem office. This area may consist of one or more communities or may include only a portion of a relatively large city.

Tandem circuit or trunk—A general classification of circuits or trunks between a tandem central office unit and any other central office or switchboard.

Tandem connection—A call switched at a tandem office.

Tandem office—A central office unit used primarily as an intermediate switching point for traffic between local central offices within the tandem area. Where qualified by a modifying expression, or other explanation, this term may be applied to an office employed for both the interconnection of local central offices within the tandem area and for the interconnection of these local offices with other central offices, e.g., long haul tandem office.

**Toll center—An office (or group of offices) within a city which generally handles the originating and incoming toll traffic for that city to or from other toll center areas and which handles through switched traffic. The toll center normally handles the inward toll traffic for its tributary exchanges and, in general, either handles the outward traffic originating at its tributaries or serves as the outlet to interexchange circuits for outward traffic ticketed and timed at its tributaries. Toll centers are listed as such in the Toll Rate and Route Guide.**

**Toll center area—The areas served by a toll center, including the toll center city and the communities served by tributaries of the toll center.**

**Toll center toll office—A toll office (as contrasted to a local office) in a toll center city.**

**Toll circuit—A general term applied to interexchange trunks used primarily for toll traffic.**

**Toll connecting trunk—A general classification of trunks carrying toll traffic and ordinarily extending between a local office and a toll office, except trunks classified as tributary circuits. Examples of toll connecting trunks include toll switching trunks, recording trunks and recording-completing trunks.**

**Toll office—A central office used primarily for supervising and switching toll traffic.**

**Traffic over first routes—A term applied to the routing of traffic and denoting routing via principal route for traffic between any two points as distinguished from alternate routes for such traffic.**

**Traffic Service Position System (TSPS)—A stored program electronic system associated with one or more toll switching systems which provides centralized traffic service position functions for several local offices at one location.**

**Traffic unit—A unit of measurement of traffic operating work which is used as the common denominator to express the relative time required for handling the various kinds of calls or work functions.**

**Tributary circuit—A circuit between a tributary office and a toll switchboard or intertoll dialing equipment in a toll center city.**

**Tributary office—A local office which is located outside the exchange in which a toll center is located, which has a different rate center from its toll center and which usually tickets and times only a part of its originating toll traffic, but which may ticket and time all, or none, of such traffic. The toll center handles all outward traffic not ticketed and timed at the tributary and normally switches all inward toll traffic from outside the tributary's toll center area to the tributary. Tributary offices are indicated as such in the Toll Rate and Route Guide.**

**Trunks—Circuit between switchboards or other switching equipment, as distinguished from circuits which extend between central office switching equipment and station equipment.**

**TSPS Complex—All groups of operator positions, wherever located, associated with the same TSPS stored program control unit.**

**TWX—Teletypewriter Exchange Service.**

**TWX connection—A completed TWX call, i.e., a call on which a TWX communication was passed between the calling and called stations.**

**TWX connection-minute-miles—The product of (a) the number of TWX connections, (b) the average minutes per TWX connection and (c) the average route miles of circuits involved.**

**TWX Switching Plan Trunks—Interexchange circuits, excluding remote access lines, which handle 100 word per minute TWX traffic only.**

**Weighted Standard Work Second—A measurement of traffic operating work which is used to express the relative time required to handle the various kinds of calls or work functions, and which is weighted to reflect appropriate degrees of waiting to serve time.**

**Wide area telephone service (WATS)—A toll service offering for customer dial type telecommunications between a given customer station and stations within specified geographical rate areas employing a single access line between the customer location and the serving central office. Each access line may be arranged for either outward (OUT-WATS) or inward (IN-WATS) service but not for both.**

**Wideband Channel—A communication channel of a bandwidth equivalent to twelve or more voice grade channels.**

**Working loop—A revenue producing pair of wires, or its equivalent, between a customer's station and the central office from which the station is served.**

## *ATTACHMENT B*

**The revisions proposed by the Joint Board in CC Docket 80–286 are revised[1] as follows:**

**1. Paragraph 11.19 is deleted.**

**2. Subparagraph 11.22(d) (now § 67.2(b)(3)(iv)) is revised by adding the words, ",except and otherwise provided" after the words "between state and interstate operations".**

**3. Paragraph 11.251 (now § 67.2(e)(1)) is revised by adding the words "and associated expenses, taxes and reserves" after the words "customer premises equipment" in the first sentence and the word "CPE" in the last sentence.**

**4. Paragraph 11.26 (now § 67.2(f)) is revised by adding the words "associated with services or plant billed to another company" after the word "Costs".**

**5. Paragraph 23.213 (now § 67.122(a)(3)) is revised by adding the words "including WATS access lines" after the words "message telephone" and deleting the words "for WATS access lines," after the words "TWX subscriber lines,".**

**6. The second sentence of Paragraph 23.421 (now § 67.124(b)(1)) is revised by substituting the word "service" for the words "transmission facility" and the word "facility".**

**7. Paragraph 23.43 (now § 67.124(c)) is revised by substituting the word "including" for the word "excluding" in Category 1.22, deleting the words "and exclusively for interstate WATS access" in Category 1.24, and deleting the words "and exclusively for state WATS access" in Category 1.25.**

**8. Paragraph 23.44 (now § 67.124(d)) is revised by deleting the words "and exclusively for state WATS access" in Category 1.31, deleting the words "and exclusively for interstate WATS access" in Category 1.32, and substituting the word "including" for the word "excluding" in Category 1.33.**

**9. Paragraph 23.442 (now § 67.124(d)(2)) is revised by deleting the words "and state and interstate WATS access".**

**10. Paragraph 23.443 (now § 67.124(d)(3)) is revised by adding the word "and" after the words "TWX service", deleting the words "and WATS access" after the words "private line", and substituting the word "service" for "services".**

**11. Subparagraph 23.447(a) (now § 67.124(d)(7)(i)) is revised by substituting "OSP Category 1.33 and COE Category 8.13" for the words "and OSP Category 1.33".**

**12. Subparagraph 23.447(b) (now § 67.124(d)(7)(ii)) is revised by adding ", COE Category 8.13" after each reference to "OSP Category 1.33".**

**13. Subparagraph 23.447(d) (now § 67.124(d)(7)(iv)) is revised by adding the words "associated with OSP Category 1.33" after the words "inside wire" and after the words "inside wire investment".**

**14. Subparagraph 23.447(e) (now § 67.124(d)(7)(v)) is revised by adding the words "associated with OSP Category 1.33" after both references to "inside wire investment" and adding the word "investment" after the words "attributable to OSP Category 1.33".**

---

**[1] Attachment A also reflects certain other changes made to satisfy the requirements of the FEDERAL REGISTER, and conform the *Separations Manual* to the format of the Commission's Rules.**

15. Paragraph 24.131 (now § 67.131(c)(1)) is revised by adding the word "common" after the words "specific category, e.g." and by substituting the words "(excluding power equipment not dependent upon common power equipment)" for the words "including power equipment,".

16. Paragraph 24.93 (now § 67.139(c)) is revised by adding the words "or weighted standard work seconds" after the words "TWX traffic units".

17. Subparagraph 24.02 (now § 67.140(b)(3)) is revised by adding the words "other than wideband equipment" after the words "included in Categories 8.12".

18. Paragraph 25.11 (now § 67.151(a)) is revised by adding the following words "Public Telephone Equipment . . . Account 235" at the end of the accounts listed.

19. Paragraph 25.112 (now § 67.151(a)(2)) is revised by adding the words "other than inside wiring provided for private line services" after the words "232 and 234", and by substituting "through" for "and" after the words "Paragraph 23.444" (now § 67.124(d)(4)).

20. Paragraph 25.25 (now § 67.152(e)) is revised by substituting the phrase "described in Paragraphs 23.444 through 23.447" (now §§ 67.124(d)(4)-67.124(d)(7)) for the phrase "described in Par. 23.444".

21. Paragraph 42.11 (now § 67.311(a)) is revised by adding the words "Repairs of Public Telephone Equipment . . . Account 607" after the words "Repairs of Buildings and Grounds . . . Account 606".

22. Paragraph 42.322 (now § 67.313(b)(2)) is revised by substituting the word "including" for the word "excluding" in both instances and deleting the words "WATS access" when they are not parenthesized.

23. Paragraph 42.323 (now § 67.313(b)(3)) is revised by substituting the word "including" for the word "excluding".

24. Paragraph 42.325 (now § 67.313(b)(5)) is revised by deleting the words "and WATS access" in both instances, substituting the word "is" for the word "are", and adding the word "and" before the words private line local channels".

25. Paragraph 42.334 (now § 67.313(c)(4)) is revised by deleting the words "WATS access," after the words "TWX service" and substituting the word "including" for the word "excluding".

26. Paragraph 42.336 (now § 67.313(c)(6)) is revised by adding the word "expense" after the word "testing".

27. Paragraph 42.5 (now § 67.315(a)) is revised by adding the words "Inside Wiring Installation Expense" after the words "Shop Repairs and Salvage Adjustments".

28. Paragraph 42.56 (now § 67.315(f)) is revised by substituting the words "the apportionment of investment in such wiring" for the words "OSP Category 1.33 plant provided in paragraphs 23.444 through 23.447".

29. New paragraphs 42.0 (now § 67.317) and 42.01 (now § 67.317(a)) are added which read as follows[2]:

42.0 Repairs of Public Telephone Equipment - Account 607

42.01 The amount in this account is allocated in the same manner as Public Telephone Equipment.

---

[2] These paragraphs have been inserted in Attachment A after Paragraph 42.6 (now § 67.316) and subsequent paragraphs have been renumbered.

30. Paragraph 44.52 (now § 67.345(b)) is revised by deleting the words "plus TWX" after the word "telephone" and adding the words "plus TWX weighted standard work seconds or traffic units" after the words "work seconds".

31. Paragraph 44.61 (now § 67.346(a)) is revised by adding the words "or traffic units" after the words "work seconds".

32. Paragraph 45.41 (now § 67.364(a)) is revised by substituting the word "including" for the word "excluding" and deleting the words "and WATS access" after the words "private line services".

33. Paragraph 46.12 (now § 67.381(b)) is revised by substituting the word "five" for the word "three", by deleting the word "and" after the words "local message processing expense" and adding the words "end user common line access charge billing expense; and other access charge billing expense." at the end of the paragraph.

34. Paragraph 46.121 (now § 67.381(b)(1)) is revised by substituting the word "five" for the word "three".

35. Paragraph 46.41 (now § 67.384(a)) is revised by adding the words "other than access charge bills" after the words "preparation of customer bills" in the first sentence.

36. New paragraphs 46.5 (now § 67.385) and 46.6 (now § 67.386) are added which read as follows:

> 46.5 End User Common Line Access Charge Billing Expense
>
> If end user common line charges for intrastate toll access are assessed in a particular state, one-half of the end user common line access charge billing expense shall be apportioned to the interstate operations. If no end user common line charge is assessed for intrastate toll access, all of the end user common line access charge billing expense shall be assigned to interstate operations.
>
> 46.6 Other Access Charge Billing Expense
>
> If access charges other than end user common line access charges are assessed for the origination or termination of intrastate services in a particular state, one-half of such expense shall be apportioned to interstate operations. If no such access charges are assessed in a particular state, all such expense shall be assigned to interstate operations.

37. Revise the first sentence of paragraph 49.31 (now § 67.413(a)) by substituting the words "in the subdivision of Account 100.1 related to the tax" for the words "upon which the tax is levied".

38. Paragraph 61.11 (now § 67.601(a)) is revised by deleting the remainder of the first sentence after the words "with this Section" and by deleting the last sentence.

39. Paragraph 61.12 (now § 67.601(b)) is revised by deleting the last sentence.

40. Paragraphs 62.1 (now § 67.611), 62.11 (now § 67.611(a)), 62.2 (now § 67.612), 62.21 (now § 67.612(a)), 63.21 (now § 67.622(a)), 63.211 (now § 67.622(a)(1)(i)), and 63.221 (now §67.622(b)(1)) are revised by adding the word "National" before the words "Exchange Carrier Association".

41. Paragraph 62.11 (now § 67.611(a)) is revised by substituting the word "1984" for the word "1985" in the second sentence, adding the words "after 1984" after the words "each year" in the third sentence and deleting the words "or the designation of a high cost portion of the interstate end user common line revenue requirements" in the first sentence.

**42. Subparagraph 62.11(a) (now § 67.611(a)(1)) is revised by adding the words", and COE Category 8.13 (in both cases excluding plant associated with WATS access lines)" after the reference to "OSP Category 1.33".**

**43. Subparagraph 62.11(b) (now § 67.611(a)(2)) is revised by adding the words", and COE Category 8.13 investment (in both cases excluding investment associated with WATS access lines)" after the reference to "OSP Category 1.33 investment".**

**44. Subparagraphs 62.11(c) and (d) (now § 67.611(a)(3) and (4)) are revised by adding the words "investment, and COE Category 8.13 investment (in both cases excluding investment associated with WATS access lines)" after each reference to "OSP Category 1.33".**

**45. Subparagraph 62.11(h) (now § 67.611(a)(8)) is revised by adding the words "excluding WATS access lines and TWX service)" after the words "(OSP Category 1.33".**

**46. Subparagraph 62.11(j) is deleted.**

**47. Paragraph 62.21 (now § 67.612(a)) is revised by adding the word "the" after the words "first nine months of".**

**48. Subparagraph 63.11(a) (now § 67.621(a)(1)) is revised by adding the words "and COE Category 8.13 investment (in both cases excluding investment associated with WATS access lines)" after each reference to "OSP Category 1.33 investment".**

**49. Subparagraph 63.11(a) (now § 67.621(a)(1)) is revised by adding the words", and COE Category 8.13 (in both cases excluding plant associated with WATS access lines)" after the reference to "investment in OSP Category 1.33".**

**50. Subparagraphs 63.11(b)-(d) (now § 67.621(a)(2)-(4)) are revised by adding the words", and COE Category 8.13 investment (in both cases excluding amounts associated with WATS access lines)" after each reference to "OSP Category 1.33 investment".**

**51. Parts 6 and 7 of Section 6 (now Subpart F) are deleted.**

**52. In the glossary the definition of the word circuit is revised by adding the word "including" before the words "WATS access".**

## *ATTACHMENT C*

Redesignation Table

| Old Paragraph | New Section |
|---|---|
| 11.1 | 67.1 |
| 11.2 | 67.2 |
| 21.1 | 67.101 |
| 21.2 | 67.102 |
| 22.1 | 67.111 |
| 22.2 | 67.112 |
| 22.3 | 67.113 |
| 23.1 | 67.121 |
| 23.2 | 67.122 |
| 23.3 | 67.123 |
| 23.4 | 67.124 |
| 23.5 | 67.125 |
| 23.6 | 67.126 |
| 24.1 | 67.131 |
| 24.2 | 67.132 |
| 24.3 | 67.133 |
| 24.4 | 67.134 |
| 24.5 | 67.135 |
| 24.6 | 67.136 |
| 24.7 | 67.137 |
| 24.8 | 67.138 |
| 24.9 | 67.139 |
| 24.0 | 67.140 |
| 25.1 | 67.151 |
| 25.2 | 67.152 |
| 25.3 | 67.153 |
| 26.1 | 67.161 |
| 26.2 | 67.162 |
| 27.1 | 67.171 |
| 27.2 | 67.172 |
| 28.1 | 67.181 |
| 28.2 | 67.182 |
| 28.3 | 67.183 |
| 29.1 | 67.191 |
| 29.2 | 67.192 |
| 31.1 | 67.201 |
| 31.2 | 67.202 |
| 32.1 | 67.211 |
| 32.2 | 67.212 |
| 32.3 | 67.213 |
| 32.4 | 67.214 |
| 32.5 | 67.215 |
| 33.1 | 67.221 |
| 33.2 | 67.222 |
| 33.3 | 67.223 |
| 33.4 | 67.224 |
| 33.5 | 67.225 |
| 33.6 | 67.226 |

| Old Paragraph | New Section |
|---|---|
| 34.1 | 67.231 |
| 41.1 | 67.301 |
| 41.2 | 67.302 |
| 42.1 | 67.311 |
| 42.2 | 67.312 |
| 42.3 | 67.313 |
| 42.4 | 67.314 |
| 42.5 | 67.315 |
| 42.6 | 67.316 |
| – | 67.317 |
| 42.7 | 67.318 |
| 42.8 | 67.319 |
| 42.9 | 67.320 |
| 43.1 | 67.331 |
| 43.2 | 67.332 |
| 43.3 | 67.333 |
| 43.4 | 67.334 |
| 44.1 | 67.341 |
| 44.2 | 67.342 |
| 44.3 | 67.343 |
| 44.4 | 67.344 |
| 44.5 | 67.345 |
| 44.6 | 67.346 |
| 44.7 | 67.347 |
| 44.8 | 67.348 |
| 44.9 | 67.349 |
| 44.0 | 67.350 |
| 45.1 | 67.361 |
| 45.2 | 67.362 |
| 45.3 | 67.363 |
| 45.4 | 67.364 |
| 45.5 | 67.365 |
| 45.6 | 67.366 |
| 45.7 | 67.367 |
| 45.8 | 67.368 |
| 46.1 | 67.381 |
| 46.2 | 67.382 |
| 46.3 | 67.383 |
| 46.4 | 67.384 |
| – | 67.385 |
| – | 67.386 |
| 47.1 | 67.391 |
| 47.2 | 67.392 |
| 48.1 | 67.401 |
| 48.2 | 67.402 |
| 48.3 | 67.403 |
| 48.4 | 67.404 |
| 48.5 | 67.405 |
| 48.6 | 67.406 |
| 49.1 | 67.411 |
| 49.2 | 67.412 |
| 49.3 | 67.413 |
| 49.4 | 67.414 |
| 49.5 | 67.415 |

| Old Paragraph | New Section |
|---|---|
| 51.1 | 67.501 |
| 51.2 | 67.502 |
| 51.3 | 67.503 |
| 51.4 | 67.504 |
| 61.1 | 67.601 |
| 62.1 | 67.611 |
| 62.2 | 67.612 |
| 63.1 | 67.621 |
| 63.2 | 67.622 |
| 64.1 | 67.631 |
| 65.1 | 67.641 |

Attorney as Witness
Evidence, Attorney Work Product

> Attorney work product doctrine protects confidentiality of an attorney's mental impressions, theories and conclusions contained in documents developed in anticipation of litigation. Work product does not protect documents prepared in course of business. An attorney witness must disclose facts pertinent to issues. Documents should be examined in camera by ALJ to determine admissibility.
>
> *–A.S.D. Answer Service*
> CC Docket 82–587

---

FCC 84–28

BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| In re Applications of | |
|---|---|
| A.S.D. ANSWER SERVICE, INC. | CC Docket No. 82–587<br>File No. 23194-CD-P-(01)-82, *et al.* |
| B.W. COMMUNICATIONS, INC. | CC Docket No. 82–588<br>File No. 23259-CD-P-(01)-82, *et al.* |
| P.A.L. COMMUNICATIONS SYSTEMS, INC. | CC Docket No. 82–589<br>File No. 23168-CD-P-(01)-82, *et. al.* |
| VINEYARD COMMUNICATIONS, INC. | CC Docket No. 82–590<br>File No. 23199-CD-P-(01)-82, *et al.* |
| For authority to construct new one-way paging stations in the Domestic Public Land Mobile Radio Service on 34 and 43 MHz frequencies at various locations throughout the United States | |

# MEMORANDUM OPINION AND ORDER

(Adopted: January 27, 1984; Released: February 1, 1984)

BY THE COMMISSION:

1. The *Order Designating Applications for Hearing*, 47 Fed. Reg. 40896, published September 16, 1982, questions whether Graphic Scanning Corporation (Graphic) is the real party in interest in the subject applications, and whether Graphic and Applicants were candid in representations to the Commission with respect to their relationship. In a *Memorandum Opinion and Order*, FCC 83-277, released June 14, 1983 (hereinafter June 14 MO&O), the Commission considered appeals of interlocutory rulings of the ALJ on various discovery matters. The June 14 MO&O ruled that Graphic and Applicants had waived their right to assert attorney-client privilege but that many of the materials for which discovery was requested were also protected by the attorney-work-product doctrine.

2. During the hearing phase of this proceeding, the ALJ relying on the June 14 MO&O, made evidentiary rulings with respect to claims that testimony was protected as work-product and with respect to production of materials previously ruled on in the June 14 MO&O. The ALJ authorized the parties to file interlocutory appeals of those rulings. Now before the Commission are: an Appeal filed July 7, 1983, by the Separated Trial Staff, Common Carrier Bureau, and a Response filed July 14, 1983, by Graphic; an Appeal of rulings requiring the testimony of Henry Solomon, filed July 11, 1983, by Graphic, and an Opposition filed July 18, 1983, by Respondents;[1] an Appeal from rulings requiring the testimony of John Pelkey, filed July 13, 1983, by Graphic, and an Opposition filed July 18, 1983, by Respondents; an Appeal from an order requiring production of a document protected by the attorney-work-product doctrine, filed September 23, 1983, by Graphic, and an Opposition filed September 30, 1983, by Respondents; and an Appeal of rulings limiting the examination of witnesses and documents, filed July 7, 1983, by Respondents, and an Opposition filed July 14, 1983, by Graphic.

3. In the June 14 MO&O we sought to expedite the discovery process by ruling, to the extent possible, on each of the pending discovery requests. That order, however, must be read in the light of the circumstances presented by the appeal. Thus, the June 14 MO&O was concerned solely with pre-trial discovery. The MO&O did not address, and the parties did not brief, how evidentiary testimony by Graphic's attorneys would impact on its work-product claims. Moreover, we were unable to rule definitively on the disclosure of

---

[1] Respondents are radio common carriers who compete with Graphic and its subsidiaries in numerous media markets, and who have filed applications which are mutually exclusive with the applications that are the subject of the instant hearing.

each of the documents in the discovery requests because those documents were not before us. Rather, relying on descriptions of the disputed documents, we found that certain categories of documents were subject to the protection of the work-product doctrine. We further found that work-product is not held inviolate in all circumstances, and that disclosure may be compelled on a showing that the party seeking disclosure has a substantial need for the materials, and is unable to secure those materials by other means without undue hardship.[2] In this proceeding, particularly since we were unaware of the specific content of the documents for which Graphic requested protection, we did not attempt to make more than generic rulings concerning the nature of the documents in question and thus the MO&O did not consider the question of whether there is a sufficient need for disclosure of Graphic's work product under the guidelines established in *Hickman* v. *Taylor* and *UpJohn Co.* v. *United States, supra.*

### *Graphic's Procedural Objections*

4. We will first address the procedural issues raised in Graphic's responses. Graphic argues that Respondents' Appeal should be dismissed since they have not raised a new or novel question of law or policy or shown that the rulings complained of would require a remand if the appeal is deferred and raised as an exception.[3] Moreover, citing *Communications Satellite Corp.*,[4] and *New York Municipal Broadcasting*,[5] Graphic argues that evidentiary rulings are inappropriate for interlocutory appeal since the significance to be given these matters can only be determined in the light of all the evidence when the entire record is reviewed.

5. The evidentiary questions raised by the instant appeals involve testimonial evidence which was not considered in our June 14 MO&O. The questions raised were considered by the ALJ who specifically authorized the appeals. The ALJ also permitted witnesses to defer responding to portions of cross-examination where he denied claims of work-product protection pending the Commission's review of his rulings. Thus, these issues are ripe for consideration and in order to facilitate the orderly disposition of this proceeding and development of a full record, we will depart from our usual practice of deferring consideration of evidentiary rulings until the time of final decision and rule on the instant appeals.

6. Graphic also argues that the Trial Staff's appeal should be dismissed because it was not authorized by the ALJ as required by

---

[2] *UpJohn Co.* v. *United States*, 449 U.S. 383, 398–99 (1981); *Hickman* v. *Taylor*, 329 U.S. 495, 511 (1947).

[3] Section 1.301(b) of the Rules.

[4] 41 FCC 2d 490, 493 (1973).

[5] 41 FCC 2d 723 (Rev. Bd. 1973).

Section 1.301(b) of the Rules. During the hearing the parties expressed their disagreements concerning the scope of the June 14 MO&O. To this end the ALJ authorized broad appeals concerning the applicability of the work-product doctrine in this case.[6] Since the Trial Staff's appeal raises a question as to the date upon which the doctrine could be invoked, we believe that it is within the scope of the appeals authorized by the ALJ.

### *The Trial Staff's Appeal*

7. The Trial Staff raises a central point concerning the date when the work-product doctrine came into play. While the June 14 MO&O did not focus on the specific date when the work-product protection could attach, the MO&O suggested that documents dated as early as December 28, 1981, were protected. The Trial Staff argues that even after petitions to deny have been filed, the Commission often does not designate proceedings for hearing, and that mere inquiries or the filing of petitions do not raise a likelihood of litigation. The Bureau asserts that in this case litigation remained a remote possibility until March 15, 1982, when the Chief, Mobile Service Division sent letters to Applicants and Graphic inquiring into the relationship between them.

8. In the June 14 MO&O we specifically found that the work-product doctrine protects the confidentiality of only those materials developed in preparation for litigation. The doctrine will not protect materials which were developed where there is only a remote prospect of future litigation.[7] Litigation cannot be anticipated in every case in which a complaint arises, when relatively few of those complaints actually result in litigation.[8] To argue that every complaint is potentially the subject of litigation is to go too far. The mere possibility of litigation is hardly tangible enough to support so broad a claim of protection.[9] In the absence of specific evidence of misconduct which had previously and regularly led to agency action, there would not be an adequate basis for invocation of the work-product doctrine.[10]

9. In the instant proceeding, Mr. Solomon, who had been Graphic's counsel prior to this litigation, testified about a telephone call his partner had received from Mr. Verveer, counsel for Pagenet Network, Inc. (one of the Respondents). He cited questions raised by Mr. Verveer concerning the relationship between Graphic and Applicants, and the history of hostility between Pagenet and

---

[6] Tr. 6187–98.

[7] *Diversified Industries Inc.* v. *Meredith*, 572 F.2d 596, 603–04 (8th Cir. 1977).

[8] *Peterson* v. *United States*, 52 F.R.D., 317 (S.D. Ill. 1971).

[9] *Coastal States Gas Corporation* v. *Department of Energy*, 617 F.2d 854, 865 (D.C. Cir. 1980).

[10] *Cf. In Re Grand Jury Investigation*, 599 F.2d 1224, 1229 (3rd Cir. 1979).

Graphic. However, he also testified that previous complaints filed by Pagenet had not led to designation of any of Graphic's applications for hearing.[11] This is not unusual. Indeed, it can be said to be the ordinary case, inasmuch as this agency receives numerous petitions to deny which do not lead to evidentiary hearings. Under these circumstances, we do not believe that a meaningful threat of litigation can be said to have arisen until the Commission, which is the instigator of action in the context of this proceeding, showed some specific institutional interest in the matters raised in Pagenet's Petition to Deny. As the Trial Staff points out, looking at the facts surrounding this case, the March 15, 1982 letters from the Chief, Mobile Services Division are the first indication that an identifiable prospect of litigation has arisen. Accordingly, the Trial Staff's appeal will be granted and March 15, 1982 will be set as the date after which the work-product doctrine may be invoked in this case.[12] The June 14 MO&O will be reversed and modified to the extent that it suggested that the work-product doctrine could apply to documents developed prior to March 15.

### *Appeals of the ALJ's Evidentiary Rulings*

10. Respondents argue that the ALJ erred in relying on the June 14 MO&O to refuse to compel testimony and the production of documents. They assert that the June 14 MO&O did not preclude the ALJ from considering whether there is a need for evidence otherwise protected as attorney-work-product, and that under the circumstances of this proceeding there is a need for full disclosure of the disputed testimony and documents.[13] Graphic, in its Opposition, claims that the arguments raised in Respondents' appeal were considered in the June 14 MO&O and that the Commission found that Graphic's work-product is entitled to special protection. It asserts that its attorneys have participated in the events in issue as lawyers representing clients in litigation, that these activities do not constitute a waiver of the doctrine, and that a contrary holding would render the work-product doctrine meaningless. Graphic concludes that there is no basis for disclosure of its attorney-work-product.

11. Graphic filed three separate appeals from rulings of the ALJ

---

[11] Tr. 6546.

[12] It should be noted that, even if the date of December 28, 1981 urged by Graphic were selected, facts concerning events that occurred during the period from December 28, 1981 to March 15, 1982 would be an appropriate subject of testimony in this proceeding as reflected in paragraphs 13–20, *infra*.

[13] Respondents contend that the June 14 MO&O is not dispositive of the present questions, because the Commission did not consider whether the assertion of the work-product doctrine had been overcome. Indeed, according to Respondents, the Commission could not have ruled on these questions at that time, since they did not arise until Graphic called its attorneys to the stand after the June 14 MO&O was released.

requiring: (1) testimony from its attorney, Henry Solomon; (2) testimony from its attorney, John R. Pelkey; and (3) records from another of its attorneys, Wayne Cooper. Graphic argues that the requested testimony and documents involve the thoughts, ideas and litigation strategy of its attorneys and as such are entitled to protection under the work-product doctrine.

12. Most of the questions raised by these appeals concern requests for testimony concerning events, and documents developed, prior to the March 15 letters which are not entitled to protection as attorney-work-product. Our ruling on the Trial Staff's appeal thus moots the appeals filed by the other parties to the extent that disclosure of information and documents is required by our ruling in paragraph 9, *supra*. We have not, however, conducted a *de novo* review of the record. Moreover, some of the requested documents were drafted after the March 15 letters, and questions may arise in conjunction with the testimony of attorney witnesses as to events occurring after March 15, 1982. We will therefore address the substance of the arguments raised by these appeals to insure that we have ruled on all work-product claims.

13. In our view, Graphic's contentions reflect a fundamental misunderstanding of the principles governing the attorney-work-product doctrine. As discussed in a leading treatise,[14] under *Hickman* v. *Taylor* and the Federal Rules of Civil Procedure, a qualified immunity applies to documents and tangible things, prepared in anticipation of litigation or for trial, by or for another party or by or for that other party's representative. While protection is accorded actual documents and other tangible things, it does not run to facts that may be learned from those materials. At the same time, there is no immunity for documents prepared in the regular course of business, rather than for the purposes of litigation, even if they contain mental impressions, conclusions, or legal theories. Finally, while the immunity for work-product is primarily applicable during the discovery stage of proceedings, the concerns reflected in the work-product doctrine do not disappear once a hearing has begun, since disclosure of an attorney's preparatory efforts during the hearing, as surely as prehearing discovery, could disrupt the orderly development and presentation of his case.[15]

14. The appeals now before us raise questions as to the extent to which the protection of the work-product doctrine applies to the testimonial phase of this particular hearing. Neither the parties nor our own research have disclosed a precedent directly on point, and

---

[14] See Wright and Miller, *Federal Practice and Procedure*, Vol 8, Sections 2021, *et seq.*

[15] See *United States* v. *Nobles*, 422 U.S. 225, 239 (1975).

the Supreme Court has specifically refused to delineate the scope of the doctrine at hearing.[16] Nonetheless, we believe that there are relevant authorities which provide a sufficient basis to resolve the legal and policy questions raised in this case. In this regard, the Concurring Statement of Justices White and Rehnquist in *Nobles, note 15 supra*, is particularly enlightening.

15. The Concurring Statement points out that case law and commentators have uniformly viewed the work-product doctrine of *Hickman* v. *Taylor* solely as a limitation on the ability of a party to obtain pretrial discovery and that it has not been viewed as a limitation on the trial court's broad discretion as to evidentiary questions at trial. The concurring Justices assert that the reasons for this approach are compelling, since the injury to the fact finding process is far greater where a rule keeps evidence from the fact finder than when it simply keeps advance disclosure of evidence from a party or protects evidence developed by his adversary which he is able to find by himself. According to the Justices, the reading of *Hickman* v. *Taylor* that the work-product doctrine does not apply to evidentiary requests at trial became a holding in *Jencks* v. *United States*,[17] where the Supreme Court affirmatively held that prior statements of a witness on the subject of his testimony are the kind of evidentiary matter to which an adversary is entitled.[18]

16. The Concurring Statement continues by observing that, even in the pretrial discovery area, work-product concepts have been considered insufficient to prevent discovery of evidentiary and impeachment material notwithstanding the fact that it came into being as a result of the adversary's efforts in preparation for trial. Thus, a member of a defense team who witnesses an out-of-court statement of someone who later testifies at trial in a contradictory fashion becomes at that moment a witness to a relevant and admissible event, and any reports he may have written about the event would be subject to disclosure. Recognizing that attorneys are permitted to testify only in certain circumstances, the concurring Justices assert that during a trial the rule of *Hickman* v. *Taylor* is unnecessary with respect to disclosure requests for an opponent's legal memoranda or statements of witnesses not called to testify, since no one could ever suggest that a lawyer's mental impressions, legal memoranda or hearsay statements would ordinarily be evi-

---

[16] *Id.*

[17] 353 U.S. 657 (1957). The *Jencks* rule is embodied in Section 1.362 of the Commission's Rules.

[18] In this regard, the Justices observe that it is very difficult to articulate a reason why statements on the same subject matter as a witness' testimony should not be turned over to an adversary after the witness has testified. The statement will either be consistent with the testimony, in which case it will be useless and disclosure will be harmless; or it will be inconsistent and of unquestioned value to the fact finder.

dence. Where such material is sought for preparation purposes only, it is within the rule of *Hickman* v. *Taylor*; but where relevant information is sought for evidentiary or impeachment purposes, and it was prepared by an individual who was called as a witness by his own side and who was not the trial attorney in the case, the Justices conclude that *Hickman* v. *Taylor* does not apply and that the interests favoring disclosure of all relevant information should prevail.

17. The analysis summarized above finds support in *McCullough Tool Company* v. *Pan Geo Atlas Corporation*, 40 F.R.D. 490 (S.D.Tex. 1966). In *McCullough*, defendant, Pan Geo-Development, sought discovery of notes, reports and other documents prepared by counsel for plaintiff in support of its counter-claim that plaintiff and an individual named Scherbatskoy had conspired to defeat previous litigation by defendant. In response to plaintiff's assertion that these materials were work-product containing mental impressions, theories and conclusions of counsel, the Court stated at pages 493–494:

> Certain of these documents may contain mental impressions, theories and conclusions of plaintiff's counsel. Nonetheless, viewed under the standards developed by this court, discovery will be ordered.
>
> The principal thrust of these documents concerns Scherbatskoy's relationship with plaintiff and not any attorneys' work product which may also be included. Pan Geo-Development's attempted discovery is not aimed at the mental impressions, theories and conclusions of plaintiff's counsel. The parties in this suit allege double dealings and fraud against each other, Pan Geo-Development alleges secret tortious dealings between plaintiff and Scherbatskoy. In all of these documents, Pan Geo-Development seeks to explore the relationship and dealings between plaintiff and Scherbatskoy. Evidence of these dealings is highly relevant to the issues of this case. That these documents may also contain mental impressions, theories and conclusions of counsel is of secondary importance, and any fortuitous inclusion of attorneys' work product will not defeat discovery of the dealings between plaintiff and Scherbatskoy. This court is satisfied that the principal probative value of each document sought is evidence of plaintiff's dealings with Scherbatskoy, and not such attorneys' work product as may be present.
>
> This is plaintiff's lawsuit. Plaintiff is before this court due to its own desires and initiative. Pan Geo-Development's counterclaim charges that plaintiff itself conspired unlawfully with Scherbatskoy. *A plaintiff cannot be reluctant.* If plaintiff wishes to prosecute its action before this court, it must be prepared fully to disclose its role in the matters which it has brought before this court.
>
> Discovery is proper under the test established by this court in Gulf Construction Company v. St. Joe Paper Company, supra, 24 F.R.D. at 414: (1) Discovery would serve the justifiable purpose of ascertaining facts relative to the issues. (2) The information requested is not intimately concerned with the functioning of counsel; it is intimately concerned with plaintiff's relationship with Scherbatskoy and only incidentally concerned with the functioning of counsel, if at all. (3) [T]here is no indication of undue prejudice, hardship, or injustice to plaintiff. In short, an especially strong showing of good cause has been made; any qualified privilege which may attach to the documents has been overcome. [Emphasis in original].

18. A similar ruling was also issued in *Handgards, Inc.* v. *Johnson & Johnson*, 413 F.Supp. 926 (N.D. Cal. 1976), where the Judge, after a thoughtful discussion of the rationale underlying the work-product doctrine, held that an attorney's opinion work-product was discoverable when such information was directly at issue and when its disclosure was essential for plaintiff to prove its case.[19] Finally, in discussing the justification for incursions into the privacy of an attorney in the preparation of his case under Federal Rule of Civil Procedure 26(b)(3), 4 Moore's Federal Practice ¶ 26.64[4] summarizes two cases in which disclosure of work-product was ordered[20] and then states at page 26–447:

> These cases indicate that when the activities of counsel are inquired into because they are at issue in the action before the court, there is cause for production of documents that deal with such activities, though they are "work product." The authors suggest that while Rule 26(b)(3) provides that protection against discovery of the attorney's or representative's "mental impressions, conclusions, opinions, or legal theories" *shall* be provided, such protection would not screen information directly at issue such as that involved in [these cases]. [Emphasis in original].

19. Turning to the specifics of this proceeding, issues have been designated concerning Graphic's relationship with Applicants and concerning the candor of Graphic and Applicants in their representations about that relationship. In connection with the questions raised in this proceeding, Graphic submitted an amendment on December 30, 1981 and entered into certain agreements with Applicants. The December 30 amendment is a list of Graphic subsidiaries organized to provide consulting services to DPLMRS carriers, including Applicants. It was prepared to update information contained in applications filed by Graphic subsidiaries not involved in this proceeding and it has been made an exhibit in this proceeding.[21] The agreements were written documents prepared, according to Graphic, to formalize previous oral understandings between Graphic's subsidiaries and Applicants. Mr. Solomon helped draft the amendment and was present when it was signed. Apparent-

---

[19] See also *O'Boyle* v. *Life Insurance Co. of North America*, 299 F.Supp. 704 (W.D. Mo. 1969); *Truck Insurance Exchange* v. *St. Paul Fire and Marine Insurance Company*, 66 F.R.D. 129 (E.D. Pa. 1975); and *Bird* v. *Penn Central Co.*, 61 F.R.D. 43 (E.D. Pa. 1973), where disclosure was required based on the fact that activities of counsel were at issue in the action before the court. *Cf. In re Doe*, 662 F.2d 1073 (4th Cir. 1981), where the court held that the work-product doctrine could not be invoked to insulate an attorney from fraud or criminal activity.

[20] *Kearney & Trecker Corp.* v. *Giddings & Lewis, Inc.*, 296 F.Supp. 979 (E.D. Wis. 1969) and *Kirkland* v. *Morton Salt Co.*, 46 F.R.D. 28 (N.D. Ga. 1968).

[21] Graphic Ex. 60, Tr. 5789.

ly, he also has knowledge about the preparation and execution of the written agreements.[22]

20. Graphic having initiated the amendment and written agreements and having placed reliance on them for the purposes of this case can not dispute the relevance and materiality of evidence concerning the *bona fides* of the relationship portrayed by these documents. To paraphrase *McCullough, supra*, evidence concerning these documents is highly relevant to the issues of this case. Graphic has come before this Commission seeking various licenses. If it wishes to demonstrate that it possesses the qualifications necessary to obtain such authorizations, it must be prepared to disclose all of the facts and circumstances concerning its relationship with Applicants. In summary, disclosure would serve the justifiable purpose of ascertaining facts relative to the designated issues; the information requested is not intimately concerned with the functioning of counsel in this proceeding,[23] rather it relates directly to the relationship between Graphic and Applicants and only incidently, if at all, involves the functioning of counsel;[24] and there is no indication of undue prejudice, hardship, or injustice to Graphic. On the contrary, the failure of a witness, such as Mr. Solomon, who has knowledge of facts pertinent to the issues designated for hearing, to disclose that information could have a significant detrimental effect upon the fact finding process.[25]

21. As noted previously, the questions raised in these appeals were not briefed or considered in conjunction with the June 14 MO&O.[26] No analysis was provided of what facts or circumstances might overcome the invocation of the work-product doctrine in this

---

[22] Barry Yampol testified he ordered that the consulting agreements be reduced to writing after receiving a Commission inquiry and requests from his attorneys (Tr. 5278–79).

[23] In view of our ruling that the agreements are directly at issue in this proceeding, it is unnecessary to determine whether these documents were prepared in the regular course of business, rather than for the purposes of litigation. Nevertheless, consideration of the documents on their face and in light of Graphic's characterization of its relationship with Applicants provides a strong basis for a conclusion that they were prepared for independent business reasons unrelated to this litigation and that the work-product doctrine would have no applicability to them. *Cf. Garfinkle* v. *Arcata National Corporation*, 64 F.R.D. 688 (S.D.N.Y. 1974).

[24] To the extent that otherwise protected information is intertwined with relevant facts, counsel's right to privacy must be balanced against the need for the facts. In making that assessment, if the testimony concerning these issues appears to be critical, disclosure of all information would be warranted so that a sound and intelligent decision may be made in this proceeding. *Cf. Xerox Corp.* v. *International Business Machines Corp.*, 64 F.R.D. 367 (S.D.N.Y. 1974).

[25] As Justices White and Rehnquist noted in *Nobles, supra*, testimony under these circumstances will either be consistent with the prior record, in which case disclosure will be harmless, or it will be inconsistent and of unquestioned value to the fact finder.

[26] See para. 3, *supra*.

proceeding. Moreover, turning to the parties' present arguments, it is clear that the protection afforded by the work-product doctrine is not absolute and that disclosure of work-product may be required upon a sufficient showing without undermining the general purpose or efficacy of the doctrine. In this case, where attorney witnesses have knowledge of relevant facts concerning the relationship of Graphic and Applicants, as well as the representations made about that relationship, we are convinced for the reasons set forth in paragraphs 13–20, *supra*, that the interests favoring disclosure of all relevant information are paramount to and must be given precedence over the work-product doctrine's ordinary protection of an attorney's privacy. Respondent's appeal will be granted to the extent that witnesses with knowledge of facts and circumstances pertinent to the relationship between Graphic and Applicants and the representations made about that relationship will be directed to testify fully with respect to such matters, and the appeals filed by Graphic, concerning the testimony of Mr. Solomon and Mr. Pelkey, will be denied.

22. Respondents, however, also seek unrestricted production of documents which may contain mental impressions, conclusions and legal analysis. Graphic in turn seeks to protect the confidentiality of the notes of its attorney Wayne Cooper under the work-product doctrine.[27] Relying on Graphic's selfserving descriptions of those documents,[28] the June 14 MO&O determined that those documents were subject to protection from discovery as attorney-work-product. In light of our ruling on the Trial Staff's appeal, the June 14 MO&O is reversed as to any documents prepared before the March 15 letters from the Chief, Mobile Services Division. With respect to documents prepared after March 15, the June 14 MO&O stated that we could not "definitively rule on the disclosure of each of the disputed documents because those documents . . . [were] not before us."[29] As we have previously stated,[30] the June 14 MO&O was not intended to foreclose further examination of the need for the documents considered in the June 14 MO&O.

23. To the extent that Respondents are seeking production of documents drafted after March 15, which would otherwise be available to assist them in examining witnesses, we do not, for the

---

[27] The ALJ directed Mr. Cooper to produce his notes for an *in camera* inspection to determine whether the notes or any parts of them were subject to disclosure.

[28] See *e.g.*, Appeal of Graphic Scanning Corp. and the Applicants, filed March 10, 1983, Ex. E. p. 6, identifying documents in issue as:

> "44. (G-79) 12/28/81 to 6/23/82 Typed and handwritten notes of Wayne Cooper, setting forth his thoughts, opinions, impressions and recollections of telephone conversations with counsel for Graphic, counsel for the Applicants, Graphic employees and others."

[29] FCC 83–277, *supra* at para. 11.

[30] See para. 3, *supra*.

reasons stated in paragraphs 13–20, *supra*, find a generic basis for assertion of the protection afforded by the work-product doctrine. However, because such documents may include separable portions containing mental impressions, conclusions and legal analysis which are not necessary for examination of the witness, the ALJ should conduct an *in camera* inspection, so that any separable portions which are not necessary for the examination of witnesses may be excluded from disclosure. Consistent with these rulings, Mr. Cooper will be required to testify as to his knowledge of facts relevant to the relationship between Graphic and Applicants and the representations about the relationship. See paragraph 20, *supra*. To the extent that Mr. Cooper's notes would otherwise be available to assist Respondents in examining him, they should be made available for disclosure subject to an *in camera* inspection.[31]

24. ACCORDINGLY, IT IS ORDERED, That the Memorandum Opinion and Order, FCC 83–277, released June 14, 1983, IS MODIFIED to conform with the ruling in paragraph 9 of this Memorandum Opinion and Order.

25. IT IS FURTHER ORDERED, That the Appeal filed July 7, 1983, by the Trial Staff, Common Carrier Bureau IS GRANTED.

26. IT IS FURTHER ORDERED, That the Appeal filed July 7, 1983, by Respondents IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

27. IT IS FURTHER ORDERED, That the Appeals filed July 11, and 13, and September 23, 1983, by Graphic Scanning Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

---

[31] While we can not at this point and on the record before us envision whether other questions may arise concerning the examination of witnesses in this proceeding, we are confident that the parties and the presiding Judge will find adequate guidance in the principles discussed above for resolution of any further dispute and that this proceeding may go forward without the need for further appellate review of such questions.

Commission
Identification, Automatic System
Identification Signal

Commission by Chief, Mass Media Bureau, notified Audicom Corp. by letter that certain code signals embedded within audio program material for automatic off-air or cable transmission verification are permitted for b/cing within its policy concerning transmission of special signals. See 22 FCC 2d 779. *–Audicom Corp.*

Del. Auth. 84–02

BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
Mr. John Quale
Mr. David E. Hilliard
Wiley, Johnson & Rein
1776 K Street, N.W.
Washington, D. C. 20006

Request submitted by Audicom Corporation for confirmation that broadcasters may transmit programs encoded by its equipment without further Commission authorization.

January 27, 1984

Dear Sirs:

This responds to the request submitted by Audicom Corporation (Audicom) on September 19, 1983 for confirmation that the transmission of certain encoded information by broadcast stations simultaneously with program material is consistent with the definition of broadcasting in Section 3(o) of the Communications Act. Audicom further requests confirmation that broadcasters may transmit programs encoded by its equipment without further Commission authorization.

As described by Audicom, the system would be used for independent verification of the broadcast of advertisements and programs by insertion of a submerged data-encoded tone. In operation, audio program sources such as records or tape recordings would be encoded and then transmitted normally over a broadcast station or cable system. The tone signal is inaudible to normal listeners. However, the signal would be monitored by equipment capable of decoding the data and making a record of its reception, along with the date and time. This information would then be used to verify the broadcast of advertisements and program material.

The Commission set forth its policy concerning the use of special signals (i.e., signals related to broadcast operation, but not intended for public use) in a *Public Notice* dated April 20, 1970. *See* 22 FCC 2d 779 (1970). The Commission recognized the benefits of these special signals and noted that they contribute to efficient broadcast operation. However, the Commission was also concerned that the use of special signals could cause some degradation of the broadcast signal. Therefore, under the authority of Section 303(e) of the Communications Act, which directs the Commission to regulate the "kind of apparatus to be used with respect to. . . the purity and sharpness of emissions from each station. . .," the Commission held that such signals cannot be employed without its specific authorization. The Commission also specified that such permission will be granted only where it is infeasible to transmit the signals by means which have no detrimental effect on the broadcast service.

Consistent with this view, the Commission has previously approved transmission of special signals by television stations under their broadcast authority. In the *Report and Order* in BC Docket 78–308 (46 FR 40024, published August 6, 1981), the Commission authorized television stations to transmit source identification ("SID") signals on the vertical blanking interval of the television video signal. These signals identify the network, the city of origin, and the date and time of a program's transmission. The intended purpose of SID information is for verification of transmission of network programs by affiliated stations.

From the Commission's action in the SID proceeding, it is clear that transmission of Audicom encoded data for purposes of verification of broadcast would be consistent with the definition of broadcasting under Section 3(o). The Audicom data, while not intended for reception by the public, is clearly related to the program material within which it is transmitted and to the operation of normal broadcast service. The verification of broadcast function that the Audicom system provides is an element of the business of broadcasting and is therefore as much a part of the broadcast production activity as cueing and control signals that are used in the program presentation activity.

It is also clear that the very nature and purpose of the information to be encoded requires that it be recorded and transmitted as an integral part of its associated program material. Thus, we believe that it would not be feasible, on a practical basis, to transmit the Audicom data separately from the program signal.

Our evaluation of the information provided to the Commission by Audicom, including test results and demonstrations, indicates that the method used to encode the data does not cause noticeable or objectionable degradation of a station's audio program service. Use of this system would not require changes or modifications to any component of a station's program presentation or transmitter equipment. We also find the Audicom system to be fully compatible with the audio transmission standards for each of the AM, FM, and television broadcast services such that its use does not necessitate changes to our broadcast technical rules.

On the basis of the above, we believe that the Audicom system is consistent with our policy concerning use of special signals and would produce neither a perceptible degradation of broadcast audio transmissions nor an annoyance to listeners. Moreover, it appears that use of this system for verification would provide a number of benefits and efficiencies that would further the public interest. Accordingly pursuant to Section 303(e) of the Communications Act, authority IS GRANTED for general use of the Audicom system by licensees in the broadcast services. This authority is limited to use of the system for purposes of verification as discussed herein. No other broadcast uses of the Audicom system are permitted without the express consent of the Commission. Authority for this action is provided under Section 0.283 of the Commission's rules.

Sincerely,

James C. McKinney
Chief, Mass Media Bureau

Frequency Coordination
Interference, Objectionable
Reconsideration, Petition for, Denial of

Petitions for reconsideration of Commission's action ordering TV station licensee to enter into formal negotiations with nearby land mobile licensees denied. Previous decision was correct and newcomer station should be required to reimburse land mobile licensees for expenses in modifying facilities to new frequencies. *Broadcast Corp. of Georgia (WVEU-TV)*

FCC 84-38

BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
BROADCAST CORPORATION OF GEORGIA (WVEU-TV)
Atlanta, Georgia
For Authority to Resume Full Power Operation

## MEMORANDUM OPINION AND ORDER

(Adopted: February 3, 1984; Released: March 8, 1984)

BY THE COMMISSION: Commissioners Quello and Dawson concurring in part and dissenting in part and issuing statements; Commissioner Rivera dissenting in part and issuing a statement; Commissioner Patrick concurring and issuing a statement.

1. The Commission has before it for consideration: (a) its June 23, 1983, action directing the Broadcast Corporation of Georgia (WVEU), permittee of Station WVEU-TV, Channel 69, Atlanta, Georgia, to enter into formal negotiations with land mobile radio licensees with a view toward changing the land mobile radio frequencies in order that WVEU could resume full power operation; (b) petitions for reconsideration of that action filed by the National Association of Business and Educational Radio, Inc. (NABER), by the Land Mobile Communications Council (LMCC), and, jointly, by the Atlanta Coca-Cola Bottling Company, Atlanta Gas Light Company, Brown Transport Corporation, Delta Air Lines, Inc., and Kelly Paving Company (Joint Petitioners); (c) opposition pleadings filed by WVEU, the National Association of Broadcasters (NAB), and the

Association of Maximum Service Telecasters (AMST); and (d) related pleadings.

## BACKGROUND

2. This proceeding has had a long history, beginning on February 4, 1981, when WVEU was granted a construction permit to modify its facilities to locate atop the Peachtree Plaza Hotel in Atlanta. When WVEU commenced program tests at its authorized power of 2630 kW visual effective radiated power (ERP) from the site, numerous complaints of objectionable interference were received from operators of nearby land mobile radio facilities. A Field Operations Bureau investigation confirmed the interference and found it to be due to three major factors: (a) the high power operation of WVEU vis-a-vis the relatively low power operation of the land mobile radio units; (b) operation of the two services on immediately adjacent frequencies (Channel 69 on 800–806 MHz and the land mobile radio facilities on 806.0125 MHz and higher); and (c) the close physical proximity of the WVEU transmitting antenna to the land mobile base station antennas. Despite WVEU's installation of six cavity filters, a high power filter on one visual transmitter, minor modifications to its transmitters, and various measures to shield the two-way receivers, objectionable interference persists—even at 6% of full power (166 kW) during daytime hours.

3. On September 29, 1982, in denying WVEU's request for authority to operate at 50% of full power for a period of six months, the Commission found that WVEU had not tried all of the technical measures which might be available to resolve the interference and gave six illustrative suggestions that should be considered. Among the suggestions offered were the changing of frequencies or transmitter locations by either WVEU or the land mobile radio licensees. WVEU was nevertheless held responsible and ordered to take whatever further corrective measures appropriate to eliminate the objectionable interference. Further, the land mobile radio licensees were directed to cooperate, including offering suggestions to resolve the problem. On reconsideration, the Commission affirmed its earlier action, and WVEU was ordered to commence corrective measures within 30 days and to show, within 90 days thereafter, that harmful interference had been eliminated or that substantial progress to that end had been made.

4. On June 23, 1983, the Commission approved a plan submitted by WVEU whereby it would pay to change the frequencies of the affected land mobile radio users. The Commission also called for good faith cooperation among the various licensees. It also required WVEU to report back to the Commission within 30 days as to the decisions of the land mobile radio licensees but cautioned that if the problems were not resolved in a manner amenable to all parties within that time period, an order would issue requiring the land

mobile radio licensees to show cause why their licenses should not be modified to change their authorized frequencies. The petitions for reconsideration filed by NABER, LMCC, and the Joint Petitioners followed.

## PROCEDURAL MATTERS

5. WVEU contends that NABER's petition should be dismissed since every argument it now raises is either a point already considered and rejected by the Commission or an argument based on facts that could have been submitted earlier. While it is true that the bulk of NABER's arguments were made earlier in the proceeding in opposition to WVEU's request for authority to resume full-power operation, much is in reaction to the Commission's June 23 action itself and is properly argued here.

6. WVEU further argues that the petitions filed by LMCC and the Joint Petitioners should be dismissed because they did not participate earlier in the proceeding, as required by Section 1.106(b) of the Commission's Rules. Although they have not previously submitted formal pleadings in the matter, four of the five joint petitioners (Atlanta Coca-Cola Bottling Company, Brown Transport Corporation, Delta Air Lines, Inc., and Kelly Paving Company) have, nevertheless, filed one or more complaints with regard to the objectionable interference caused by WVEU. Because LMCC and the Joint Petitioners raise many of the same issues as NABER and because their pleadings aid in the resolution of this proceeding, we will, in the exercise of our discretion, also consider their petitions. Similarly, the pleadings filed by AMST and NAB in support of WVEU will also be considered.[1]

## SUMMARY OF PLEADINGS

7. Both NABER and LMCC contend that the Commission's action was a rulemaking proceeding but did not follow the required procedures.[2] In support of this contention, they argue that the action sets a precedent with broad applicability by prospectively adopting a solution to all situations in which a Channel 69 facility causes objectionable interference to pre-existing land mobile radio licensees. In this regard, the petitioners further contend that the Commission's decision will cause land mobile radio licensees who may potentially experience interference from television operations always to be in fear of the television licensee's later demanding that

---

[1] The NAB's motion to accept its late-filed opposition is granted.

[2] Among the legal requirements for a rulemaking proceeding, as provided by Section 553 of the Administrative Procedure Act (APA) (5 U.S.C. § 553) are notice of the proposed rulemaking and an opportunity for interested persons to participate in the proceeding through the submission of written data, views, or arguments. The Commission is also required to publish the substantive rule at least 30 days before its effective date.

all of their equipment be changed. In further support of their argument that the Commission should have proceeded by rulemaking, the petitioners assert that the Commission's action created a guard band for Channel 69 by reallocating spectrum previously allocated to the land mobile radio service. Finally, they contend that a formal rulemaking proceeding is necessary because the Commission changed its prior policy of requiring the "newcomer" to alter its facilities to accommodate pre-existing licensees.

8. NABER and the Joint Petitioners argue that the Commission did not sufficiently assess the facts before issuing its decision. Specifically, both petitioners argue that the Commission did not accurately determine the number of land mobile radio licensees that might be affected by WVEU's resumption of full-time, full-power operation and the attendant costs of having those licensees change frequencies. NABER contends that as many as 95 community repeater systems may be affected here and that many of these systems contain more than 100 mobile units. The petitioners further argue that, because the Commission has made an insufficient effort to determine which frequencies would be free from interference once WVEU resumes full power operation, it is premature to assign the land mobile radio licensees new frequencies. NABER also contends that, in determining that the frequencies of the land mobile radio licensees should be modified, the Commission gave insufficient attention to alternative solutions, such as moving WVEU's transmitter, the modification of its frequency, or a combination of other safeguards. Of major concern to NABER and the Joint Petitioners are the costs of relocating all the affected land mobile radio systems and WVEU's ability to underwrite those costs. The Joint Petitioners, for example, find fault with WVEU's estimate that modification of the frequencies of the land mobile radio licensees would be a relatively inexpensive alternative. WVEU had contended that it would be only one-tenth the cost of moving WVEU from Channel 69 to Channel 63, but the Joint Petitioners point out that that figure covers only 12 land mobile radio systems, when many times that number is actually involved. Moreover, several land mobile radio licensees are hesitant about going forward with the modifications because of a lack of willingness or ability on WVEU's part to commit, in advance, the financial resources needed to accomplish the changes. They contend that WVEU is approaching bankruptcy, in part because of the cancellation of its STV authorization. The licensees are also concerned that WVEU will not pay for any subsequent modifications that might be necessary or that the station will not reimburse them for such miscellaneous expenses as "down time" caused by the change of equipment or expenses already incurred in installing filters to alleviate the interference. Because of these uncertainties, the land mobile radio licensees have demanded the establishment of an escrow fund.

9. In opposition to the petitioners' contentions that the Commission's action amounted to a rulemaking, WVEU argues that the Commission gave specific assurance that its decision would not have precedential value in different factual circumstances and that it would not apply prospectively to other Channel 69/land mobile radio proceedings. WVEU adds that the Office of Science and Technology Report (OST Report) on the matter also makes clear that acceptance of the plan proposed by WVEU should not be regarded as setting a precedent. WVEU further argues that the Commission's decision does not create a guardband but, rather, delays the utilization of the land mobile radio band closest to Channel 69 until more precise equipment to avoid the objectionable interference becomes available. With respect to petitioners' third argument, WVEU notes that, while an agency may change its policies or reverse a precedent without engaging in rulemaking, no policy was, in fact, reversed here. WVEU argues that *Sudbrink Broadcasting of Georgia*, 65 F.C.C. 2d 691 (1977), and *Jack Straw Memorial Foundation*, 35 F.C.C. 2d 397, *recon. denied*, 37 F.C.C. 2d 544 (1972), stand for the proposition that the "newcomer" has the responsibility to implement measures to rectify the interference but that it need not make the modifications itself to accommodate the pre-existing licensees. WVEU contends that the Commission did not stray from this policy by requiring the broadcaster to bear the financial responsibility of moving the land mobile radio licensees to other frequencies.

10. WVEU maintains that petitioners' concern as to the number of affected licensees is misplaced, since the Commission has directed that all affected land mobile radio licensees licensed prior to June 23, 1983, whatever their exact number may be, are within the scope of its Order. WVEU, however, notes that NABER has exaggerated the potential number of land mobile radio channels affected by including licensees from as far away as Knoxville, Tennessee, and Johnston, South Carolina. WVEU also disputes the fact that an insufficient effort has been made to determine which frequencies would be free from interference once WVEU resumes full power operation. WVEU notes that the OST Report indicates that the Commission staff has (a) studied the existing record which shows, among other things, that the land mobile radio users themselves suggested interference above 808 MHz not to be objectionable; (b) communicated with various licensees to determine what channels would be acceptable, and (c) made a careful engineering analysis themselves. WVEU does not speak to the issue of alternative solutions, except to say that all other options have already been exhaustively argued and rejected.

11. With respect to its ability to reimburse the land mobile radio licensees for the expenses incurred in shifting their frequencies, WVEU contends that it is financially able to meet its obligations,

notwithstanding the fact that it no longer provides STV programming.[3] To assure the payment of its obligations, WVEU contends that its principal shareholders are willing to guarantee payment of any sums committed in this regard and that it is willing to establish an escrow sufficient to cover those expenses, provided that the establishment of such an account is considered to be full discharge of its monetary obligations. WVEU admits that it has refused to pay for "down time" but has agreed to accommodate land mobile radio licensees by arranging for equipment changes to avoid "down time." Finally, WVEU has agreed to pay for any second modifications that might be necessary, but only if WVEU is the cause of the interference.

12. AMST and NAB both state that requiring the broadcaster to pay for moving the frequencies of the land mobile radio licensees does not violate any Commission policy or reverse any Commission precedent. AMST notes that such a move would permit the effective use of Channel 69 for television service in Atlanta without diminishing land mobile radio communications capacity, since the land mobile radio channels that would be vacated in downtown Atlanta could be used in suburban Atlanta locations. NAB applauds WVEU for making good faith efforts to solve the problem and states that, if the broadcaster were forced to shift to another frequency, Channel 69 would, in effect, become a guard band.

## DISCUSSION

13. The Commission's policy with respect to objectionable interference to existing licensees caused by a "newcomer" dates back to our decision in *Midnight Sun Broadcasting Co.*, 11 F.C.C. 1119 (1947), where we held the "newcomer" to be responsible for resolving the interference problem to another broadcaster. Over the years, this policy has been embellished and refined to meet the specific factual problems of subsequent cases, none of which were resolved in the context of a rulemaking proceeding.[4] With WVEU, we have once again encountered a situation of objectionable interference being caused by a "newcomer" but have applied our policy in a slightly different way to the facts of this case. Specifically, given the history of this case, we found WVEU's offer to pay for changing the frequencies of affected land mobile radio licensees to be the most expeditious means of resolving a serious interference problem. Once again, this was accomplished without "notice and comment" rule-

---

[3] WVEU contends that the revenues it receives from the broadcast of video music programming are slightly in excess of those received under the STV agreement.

[4] *See also*, *B & W Truck Service*, 15 F.C.C. 2d 769 (1968) (land mobile to broadcaster); *Jack Staw Memorial Foundation*, *supra* (broadcaster to land mobile); *H & B Communications, Corp. v. F.C.C.*, 420 F.2d 638 (D.C. Cir. 1969) (broadcaster to CATV head end).

making, a procedure which NABER and LMCC believe is contrary to the provisions of the APA. See Footnote 2, *supra*.

14. Section 551(4) of the APA defines a rule as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy. . .." Although the APA focuses on "future effect" as the essential characteristic of a rule, a careful reading of the legislative history discloses that Congress intended to establish a definition of rulemaking based on general applicability. Early drafts of the APA did just that; however, when ratesetting was included in the definition of a rule, it was reworded to include actions of particular applicability as well, and the words "future effect" became the key point of distinction. Most authorities, judicial and otherwise, have nevertheless found the literal APA definition, with its reference to "particular," to be unworkable and believe that Congress did not intend to change the basic definition of rulemaking from that which it was traditionally understood to be. *PBW Stock Exchange, Inc. v. S.E.C.*, 485 F.2d 718, 732 (3rd Cir. 1973), *cert. denied*, 416 U.S. 969 (1974); 1 K. Davis, Administrative Law Treatise § 5.02 at 295 (1958); Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 Harv. L. Rev. 782, 788–89 (1974). Consequently, rulemaking may be distinguished from adjudication as follows. The former is "prospective in scope and nonaccusatory in form, directed to the implementation of general policy concerns into legal standards. Adjudication, on the other hand, is individual in impact and condemnatory in purpose, directed to the determination of the legal status of particular persons or practices through the application of preexisting legal standards." *F.T.C. v. Brigadier Industries Corp.*, 613 F.2d 1110, 1117 (D.C. Cir. 1979).

15. Under those guidelines, this proceeding is adjudicatory in nature. Its purpose is to apply Commission policy to the specific factual situation of the Atlanta Channel 69-land mobile radio case and does not create absolute standards of general, prospective applicability. Our June 23 action states repeatedly that it applies only to "this matter" or "this case." Moreover, the OST Report adds that future applicants for Channel 69 in other cities where objectionable interference to existing land mobile radio licensees is likely to occur cannot expect a solution such as the one here. This is because, in recognizing the interference problem in Atlanta, the Commission issued a March 1, 1982, Public Notice advising all prospective applicants for Channel 14 or Channel 69 that the grant of their construction permits would be conditioned to provide that, prior to program test authorization, the permittee take adequate measures to provide protection against objectionable interference to existing land mobile radio facilities in the 460–470 MHz band (for Channel 14) or 806–816 MHz band (for Channel 69). Because WVEU's construction permit was granted prior to this date, no such condition was

attached, and it therefore became necessary to resolve this factual situation within the context of an Order.

16. We also reject the petitioners' argument that the Commission should have proceeded by rulemaking because its action created a guard band for Channel 69 by reallocating spectrum previously allocated to land mobile radio licensees. A guard band is a frequency band left vacant between two channels to give a margin of safety against mutual interference. Guard bands are fixed in width and are usually established nationwide or throughout other large areas so as to allow users on one side of any particular guard band to operate without regard to users on the other side. Guard bands are spectrally inefficient and, as a rule, are used only when coordination is impractical. A more efficient and far more common approach to prevent mutual interference is to isolate users by a combination of factors including frequency, distance, power and antenna height. In any particular case there are usually several choices, limited, of course, by cost, equipment characteristics, and the nature of the service. This approach has been used for years in all of the radio services regulated by the Commission, and was used in this case and in other cases applying the "last in" policy. When viewed in that light, our action was an application of an existing, general policy to a specific case, not the creation of a guard band requiring a rulemaking proceeding.

17. We also reject petitioners' argument that a rulemaking should have been undertaken because the Commission changed its prior policy. Initially, it should be noted that an agency may change its policies or reverse a precedent without engaging in rulemaking, and determining what procedure to follow in developing agency policy is a matter of agency discretion. *S.E.C. v. Chenery Corporation*, 332 U.S. 194, 202–203 (1947); *N.L.R.B. v. Wyman-Gordon Co.*, 394 U.S. 759, 764–65 (1969). Here, however, the Commission has not reversed prior policy. *Sudbrink* stands for the proposition that the "newcomer" is responsible, financially and otherwise, for taking whatever steps are necessary to eliminate the objectionable interference, and in *Jack Straw*, the Commission ordered the broadcaster to cooperate with the existing land mobile radio licensees in an effort to solve the problem. Similarly, we have held WVEU financially responsible for eliminating the interference and have ordered all of the parties to cooperate in the matter. The fact that the existing licensees are the ones that will be required to change frequencies does not detract from our policy of "newcomer" responsibility.

18. The fact that the Commission did not make an exhaustive list of the affected land mobile radio users is of no consequence. Indeed, it would be impossible to assemble such a list without the empirical data engendered by WVEU operating at full power during peak business hours. We can, however, state that the land mobile radio licensees most likely to be affected operate between 806 and

809 MHz and within six miles of WVEU's antenna atop the Peachtree Plaza Hotel. Notwithstanding any previously compiled list of users, it will be incumbent upon WVEU, once it goes to full power, to reimburse the land mobile licensees which have encountered objectionable interference and which were in existence as of June 23, 1983. The reimbursement will be for any direct expenses incurred in the elimination of the objectionable interference, including modification of the land mobile licensees to other frequencies, moving of their transmitter sites, or the installation of interference reducing equipment.[5] WVEU's responsibility would also extend to any subsequent modifications of facilities of those land mobile licensees that might be necessary to eliminate objectionable interference.

19. We further reject the petitioners' argument that we have not thoroughly investigated other solutions to the interference problem. As we stated in paragraph 2, *supra*, on September 29, 1982, in denying WVEU's request for authority to operate at 50% of full power for a period of six months, we identified six possible solutions to the problem, including the installation of additional filters, the identification and correction of intermittent spurious emissions, and the changing of the frequencies or transmitter locations of the affected land mobile radio licensees or of WVEU. While the filters and emissions solutions might help to reduce the objectionable interference, they may not eliminate it, and it could well be a waste of resources to pursue those suggestions. It is readily agreed that the options most likely to succeed in eliminating the interference are the changing of the frequencies or transmitter locations of the affected parties. When WVEU first presented the Commission with a cost comparison, it did so under the assumption that only 12 land mobile base stations with 511 mobile units would have to be moved at a cost of approximately $117,000. We estimate, however, that between 806 and 809 MHz and within six miles of WVEU's antenna site there are approximately 51 base stations and 640 mobile units and that the cost of moving them to new frequencies, using WVEU's cost estimates as a basis, would be in the range of $150,00–$250,000. While it is impossible to ascertain at this point whether those figures will represent the number of land mobile radio licensees that will ultimately be affected, they do, nevertheless, serve as a point of comparison to the costs of moving WVEU. Because the broadcaster has estimated the costs of moving its transmitter site at more than

---

[5] In recognition of the fact that differences among the parties will serve only to prolong the controversy, we expect WVEU and the land mobile radio licensees to cooperate fully in a resolution of this matter. The Commission does not, in the first instance, intend to act as the arbiter among the parties in the reimbursement of expenses. Although we recognize that, in making the necessary changes, some disruptions and inconveniences to the land mobile radio users may be inevitable, we expect these to be minimal. As long as WVEU cooperates reasonably with the land mobile users to minimize "down time" expenses.

$350,000 and of changing frequencies at $540,000, it is still apparent that the cost of modifying the land mobile licensees' frequencies, while not as inexpensive as previously stated, would still be a far less expensive option than requiring WVEU to move. WVEU has further indicated that, while the relocation of the land mobile radio licensees to other sites would be the least expensive remedy, there are not enough sites sufficiently high to afford the relatively low-power land mobile radio users comparable coverage and performance, and sufficiently distant to avoid objectionable interference. Finally, now requiring WVEU to modify its own frequency is a less desirable option, since to do so would adversely affect several petitions for rulemaking to utilize vacant channels throughout portions of the southeastern United States.[6]

20. Finally, the petitioners have spoken only in generalities as to WVEU's alleged inability to reimburse the expenditures of the land mobile radio licensees. As we set forth in paragraph 11, *supra*, WVEU contends that it is financially able to meet its obligations in this regard due to revenues from the broadcast of video music programming, and we have no reason to doubt this. Moreover, WVEU has stated that its principal shareholders are willing to guarantee payment of any sums the station becomes obligated to pay as reimbursement to the land mobile radio licensees, and, as an added measure of security, it has agreed to establish an escrow fund to cover those expenses. Finally, we would note that the establishment of an escrow account or other security arrangement may not be relied upon by WVEU to limit its liability in this matter. From the record, it appears that WVEU will have sufficient funds to reimburse the land mobile radio licensees and is proceeding in good faith to that end. Consequently, we find it unnecessary to impose a system of reimbursement upon the parties; however, we do expect them to cooperate fully with each other in the resolution of this problem.

## CONCLUSION AND ORDER

21. While the parties in this proceeding may disagree on a solution, they all concede that the *status quo* of a television station operating at six percent of authorized power during the daytime hours and still causing objectionable interference is unacceptable. After carefully reviewing the various options available for eliminating the interference, particularly in light of the petitioners' concerns in that regard, we conclude that our previous decision was correct and that WVEU, as the "newcomer", should be required to reimburse the land mobile radio licensees for their expenses in modifying their facilities to new frequencies. Consequently, the petitions for reconsideration filed by NABER, LMCC, and the Joint Petitioners

---

[6] There are nine such petitions for rulemaking pending to assign various channels to communities in Georgia, Tennessee, Alabama, Kentucky, and North Carolina.

will be denied. As we have previously stated, we expect good faith negotiations on the part of all the parties in this matter. Moreover, we expect WVEU to establish and implement procedures to coordinate the gathering of information and the preparation of applications needed to carry out the frequency changes. WVEU will be directed to report back to the Commission within 30 days of the release of this Order as to the status of its negotiations. That report shall, in part, contain a list of those land mobile radio licensees that have either filed or agreed to file for a new frequency and a separate list of those who have not so agreed.

22. Accordingly, IT IS ORDERED, That the petitions for reconsideration filed by the National Association of Business and Educational Radio, Inc., the Land Mobile Communications Council, and jointly, by the Atlanta Coca-Cola Bottling Company, Atlanta Gas Light Company, Brown Transport Corporation, Delta Air Lines, Inc., and Kelly Paving Company ARE DENIED.

23. IT IS FURTHER ORDERED, That, within 30 days of the release of this Order, Broadcast Corporation of Georgia shall report to the Commission as to the status of its negotiations with the affected land mobile radio licensees and as to the establishment of an escrow account or other security arrangement.

24. IT IS FURTHER ORDERED, That, if at the end of 90 days from the release of this *Order*, Broadcast Corporation of Georgia has not resolved the interference problems by funding the reasonable and prudent expenses of eliminating the interference, or cannot demonstrate to the Chief, Mass Media Bureau, that it has made a good faith effort to do so, the Chief, Mass Media Bureau shall, in accordance with Section 73.1620(b) of the Commission's Rules, SUSPEND the authority of WVEU to conduct program tests and shall then return to the Commission with a recommendation for resolving the matter. The Chief, Mass Media Bureau, shall afford WVEU 15 days to respond to any proposed Order of Suspension before such Order is issued.[7]

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

---

[7] Likewise, if at the end of this period WVEU has resolved the interference problems by funding the reasonable and prudent expenses of the land mobile licensees or has demonstrated good faith efforts to do so, the Chief, Private Radio Bureau, pursuant to our June 23, 1983, letter, FCC 83–291, shall initiate modification proceedings against any land mobile licensees refusing to undertake appropriate changes.

February 3, 1984

## SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO DISSENTING IN PART

In re: Application of Broadcast Corporation of Georgia for authority to resume full power operation.

I dissent to that part of the decision directing the Chief, Mass Media Bureau, to terminate WVEU(TV)'s operating authority should they not demonstrate "a good faith effort" to conclude these proceedings within 90 days. I do not doubt WVEU's ability to comply, but I feel that they have already fully demonstrated such efforts.

It is the Commission that has not completed its responsibilities. In my view, orders should issue immediately to the affected land mobile licensees directing them to show cause why their licenses should not be modified to end this interference.

Re: Reconsideration of
Request of Broadcast Corp.
of Georgia for Authority to
Resume Full Power Operation

## STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON CONCURRING IN PART AND DISSENTING IN PART

As I stated in an earlier incarnation of this proceeding, I believe that the Commission would be much better off to apply its traditional "first in" policy to what has become the lingering "Channel 69 problem." *Broadcast Corporation of Georgia*, 96 F.C.C.2d __ (1983) (Dawson, C., dissenting). Accordingly, I dissent to those portions of the instant decision which place the burden on land mobile licensees to move from their existing locations or frequencies. *See, e.g.*, ¶¶ 21, 22, and 24, n. 7.[1]

I concur in the item insofar as it places a burden on WVEU-TV to resolve the interference resulting to existing land mobile stations or face suspension of the station's program test authority. *See* ¶ 24. I believe that this more nearly comports to the Commission's "first in" policy and holds the only real hope that this situation will be satisfactorily resolved.

---

[1] However, I support that part of the decision which delays any Commission action against the affected land mobile licensees for at least 90 days. *See* ¶ 24, n. 7.

## STATEMENT OF
## COMMISSIONER HENRY M. RIVERA
## DISSENTING IN PART

RE: Request of Broadcast Corporation of Georgia (WVEU-TV), Channel 69, Atlanta, Georgia, for Authority to Resume Full Power Operation.

I dissent to this *Memorandum Opinion and Order* to the extent that it requires WVEU to pay for relocating land mobile licensees licensed after WVEU's construction permit was issued. *See Report of Broadcasting Corporation of Georgia (WVEU-TV), Channel 69, Atlanta, Georgia for Authority to Resume Full Power Operation*, adopted June 23, 1983 (Rivera, Comm'r, dissenting).

## CONCURRING STATEMENT OF COMMISSIONER DENNIS R. PATRICK

In re: Reconsideration of Request of Broadcast Corporation of Georgia (WVEU-TV), Channel 69, for authority to resume full power operation.

I did not participate in the Commission's original decision in this matter, and I am not certain that I would have reached the conclusion of the majority with respect to how the "first-in" doctrine should be applied to these factual circumstances. However, I concur in the decision reached in this Memorandum Opinion and Order as representing the best means under the circumstances for resolving the current Channel 69 problem. By placing the burden on WVEU to negotiate with the land mobile licensees as to the compensation due them for their move, the Commission has, in my opinion, moved closer to a correct application of the "first-in" policy and, in addition, has hopefully spurred this matter to a conclusion.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

June 23, 1983

MM

FCC 83-291

Released: July 26, 1983

IN REPLY REFER TO:

Broadcast Corporation of Georgia
c/o E. William Henry
Ginsburg, Feldman, Weil and Bress
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
AND
(Land Mobile Licensees (23))

Gentlemen:

This refers to your February 17, 1983 request for authority to resume full power operation of station WVEU(TV), channel 69, Atlanta, Georgia, supplemented on April 26, 1983. We have reviewed the request as supplemented and believe that it may be a constructive step toward a resolution of the interference problems being experienced in Atlanta.

Broadcast Corporation of Georgia was granted a construction permit for channel 69 on February 4, 1981. WVEU completed construction of its authorized facilities and commenced program tests at its authorized power. Complaints of objectionable interference were then received from 23 operators of land mobile facilities co-located with the WVEU transmitter atop the Peachtree Plaza Hotel in Atlanta. A Field Operations Bureau investigation confirmed the interference which is apparently due to three major factors: (a) the high power operation of WVEU (2630 kW visual effective radiated power) and the relatively low power operation of the land mobile radio units; (b) operation of the two services on immediately adjacent frequencies (channel 69 on 800–806 MHz and the land mobile radio facilities on 806.0125 MHz and higher); and (c) the close physical proximity of the WVEU transmitting antenna to the land mobile base station antennas (between 50 and 100 feet apart). WVEU tried numerous measures to eliminate the interference to the land mobile licensees. Despite the installation of six cavity filters, a high power filter on one visual transmitter, minor modifications to its transmitters, and various measures to shield the two-way receivers, objectionable interference persists—even at 6% of full power (166 kW).

On April 13, 1982, WVEU requested authority to operate at 50% of full power for a period of six months. The Commission, in denying the request, found that WVEU had not tried all of the technical measures available to resolve the interference and gave six illustrative solutions that WVEU might consider. Consequently, WVEU was ordered to take further corrective measures to eliminate the objectionable interference. Further, the land mobile radio licensees were directed to cooperate by offering suggestions to resolve the problem. As we pointed out, the burden of correcting the interference, financially and otherwise, is upon WVEU, as the "newcomer," citing *Sudbrink Broadcasting of Georgia, Inc.*, 65 FCC 2d 691, 692 (1977); *Jack Straw Memorial Foundation*, 35 FCC 2d 397, *reconsideration denied*, 37 FCC 2d 544 (1972). On Broadcast Corporation of Georgia, c/o E. William Henry and (Land Mobile Licensees (23)) reconsideration, the Commission affirmed its earlier action and WVEU was ordered to commence corrective measures within 30 days and to show, within 90 days thereafter, that harmful interference had been eliminated or that substantial progress to that end has been made.

WVEU now proposes to bear the expense to change the frequencies of the affected land mobile radio licensees in order to eliminate the objectionable interference. This can be accomplished, according to WVEU, with a minimum of time and effort and "with no interruption to the land mobile services." WVEU estimates that the costs to move the affected land mobile facilities to different frequencies would be about one-tenth of the cost of moving station WVEU from channel 69 to channel 63.

After careful review of the proposal, it appears that the concept of reimbursing a move in land mobile frequencies is a favorable approach for resolving this matter.[1] Upon that basis, we are directing you to enter formal negotiations with the objective of resolving this matter.[2]

---

[1] In this case, facilities comparable to those currently occupied by the land mobile licensees are available and the cost of moving these licensees to those facilities is an order of magnitude less than the cost of other potential solutions (e.g., changing the frequency or location of the broadcast operation). Furthermore, this is the first assignment of the channel 69 frequency following the reallocation of channels 70–83 to land mobile use which has raised significant interference issues; as a result, and unlike other cases where modification of licenses has been involved, the broadcast frequency was already assigned prior to the discovery of the objectionable interference.

[2] To this end, an engineering analysis of the Peachtree Plaza interference problem and the land mobile frequencies available in the area, which was prepared by the staff of the Office of Science and Technology, is available for use by WVEU and the affected land mobile licensees if they so choose. It should be noted that there are at least two land mobile users not located on Peachtree Plaza that will probably be affected by WVEU's full power operation. WVEU will be expected to negotiate with these licensees as well.

We remind the affected land mobile licensees that Commission policy requires affected parties to work in a cooperative manner to resolve interference problems. At the same time, we remind WVEU that "the 'newcomer' is responsible, financially and otherwise, for taking whatever steps may be necessary to eliminate objectionable interference." *Sudbrink, supra* at 692. This obligation refers to *all* land mobile users experiencing harmful interference that were licensed prior to the date of adoption of this letter. We expect good faith negotiations on the part of all parties in this matter. WVEU is directed to report back to the Commission within thirty (30) days with respect to the final decision of the affected parties in this matter. Broadcast Corporation of Georgia, c/o E. William Henry and (Land Mobile Licensees (23))

In the event these problems are not resolved in a manner amenable to all parties within this thirty (30) day period, an order shall thereafter issue requiring the land mobile licensees to show cause why their licenses should not be modified to change their authorized frequencies, pursuant to Section 316 of the Act, 47 U.S.C. Section 316. Such order shall include provisions that Broadcasting Company of Georgia shall bear the reasonable and prudent costs of changing frequencies and shall not operate at power levels in excess of those currently authorized until this matter is resolved. To this end, the Chief, Private Radio Bureau Is Directed to issue appropriate orders to show cause.

BY DIRECTION OF THE COMMISSION *
WILLIAM J. TRICARICO, *Secretary*

* Chairman Fowler concurring in the result; Commissioner Fogarty not participating; Commission Dawson dissenting and issuing a separate statement; Commissioner Rivera dissenting in part and issuing a separate statement.

Re: FCC 83-291, WVEU (TV),
Atlanta, Georgia.

## DISSENTING STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON

This should have been a relatively simple case, and I am convinced that it would have been had it involved two broadcast stations.

Simply put, WVEU (TV), which operates on television channel 69, adjacent to spectrum allocated for land mobile use, chose to locate its transmitter on top of a building which was already occupied by numerous land mobile base stations. Substantial interference resulted.

Consistent Commission precedent would require WVEU (TV), as the "last in," to rectify the interference, through traps and filters or ultimately by a change in the TV station's transmitter location or frequency. *E.g.*, *Sudbrink Broadcasting of Georgia, Inc.*, 65 F.C.C. 2d 691, 692 (1977). Remarkably, the Commission had already found precisely this with specific regard to this case. *Broadcast Corporation of Georgia*, 91 F.C.C. 2d 854, *reconsideration denied*, 52 Rad. Reg. 2d (P&F) 1361 (1982).

Yet, it now appears that this simple and sensible rule will not be applied to this case. Rather, the majority will require the land mobile stations—under the threat of show cause orders—to move frequencies, with the costs of the moves to be borne by WVEU (TV). Thus, the majority has manufactured a solution whereby channel 69 will be allowed to choose the most financially convenient resolution of the problem even though it means the displacement of "first-in" land mobile stations by a "last-in" broadcast station.

Despite the attempts of the majority to distinguish this case,[1] I think that this decision does great violence to the "last in" policy. And I think that this is unfortunate. It is a policy that makes good practical sense, has been consistently applied and has served the FCC well by allowing the Commission to refrain from becoming involved in the day-to-day engineering of broadcast stations.

---

[1] The majority's distinction rests largely on the fact that "facilities comparable to those currently occupied by the land mobile licensees are available and the cost of moving these licensees to those facilities is an order of magnitude less than the cost of other potential solutions (e.g., changing the frequency or location of the broadcast operation)." However, it is nonetheless true that an alternative frequency is available to WVEU (TV), and because of the nature of the stations, a change of frequency or location by a television station will almost always cost more than a change in frequency or location of a land mobile station. The meaning for land mobile stations is clear: They exist only insofar as they fail to interfere with broadcast stations, no matter which was in operation first.

## STATEMENT OF COMMISSIONER HENRY M. RIVERA DISSENTING IN PART

RE: Request of Broadcast Corporation of Georgia (WVEU-TV), Channel 69, Atlanta, Georgia, for Authority to Resume Full Power Operation.

I dissent to that part of this decision which requires WVEU to pay for relocating land mobile licensees (the "Licensees") licensed after WVEU's construction permit was issued. The Licensees have no right to be compensated under to the Commission's first-in right doctrine. This doctrine, as enunciated in *Sudbrink Broadcasting of Georgia, Inc.* 65 F.C.C. 2d 691, 692 (1977), required Sudbrink, as recipient of the later issued construction permit for an AM radio station, to be "responsible, financially and otherwise," for eliminating objectionable interference to an AM licensee authorized and existing *before* Sudbrink's construction permit was issued.

*Jack Straw Memorial Foundation* 35 F.C.C. 2d 397 (1972) at 401 is in accord with *Sudbrink* and says:

> Since desensitization can be a problem in some circumstances, and since KRAB has agreed to a grant conditioned on its taking steps to minimize interference, we shall impose an appropriate condition. This condition shall, however, apply only to *existing* users. We do not believe that KRAB should be responsible for resolving all interference problems that may arise in the future. Any future users will take their authorization with notice of KRAB's operation. (Emphasis added.)

It may very well be in WVEU's best interest to compensate the Licensees. But, as these cases demonstrate, WVEU is not legally required to do so.

The majority has missed a golden opportunity to clarify the first-in right doctrine by specifying that the date of issuance of the construction permit is the date this agency will use to determine the rights of the parties. *Sudbrink* and *Jack Straw* do not specify the construction permit date as the "triggering" date. However, it is very difficult for me to conceive of a better date. It is on the construction permit date that the permittee's rights vest to protection of its frequency assignment from modification by interference or otherwise.[1] Also, it is on the construction permit date that this Commission unequivocally identifies the permittee as the best qualified to

---

[1] Section 316 of the Communications Acts provides that:

> Any station license or *construction permit* may be modified [only after] . . . the licensee or permit shall be . . . given reasonable opportunity . . . to show cause by public hearing . . . why such order of modification should not issue . . ." 47 U.S.C. § 316(a)(1976) (emphasis added).

*See also* 47 U.S.C. § 312(c) (providing for license or *construction permit* revocation after show cause order on license or permittee); *cf. L.B. Wilson, Inc.* v. *Federal* operate on a particular frequency. Finally, it is on this date that the permittee commits it financial and other resources to begin to construct the station.

But for the requirement that WVEU compensate land mobile operators authorized after its construction permit was issued, I endorse the Commission's approach to spectrum conflict resolution in this case. This approach has, as its guiding principle, requiring reasonable accommodation among competing users. We must continue this new principle in the inevitable disputes that will be caused by intensified use of finite spectrum. In this way, the Commission will best effectuate its mandate to "encourage the larger, more effective use of radio in the public interest."[2]

---

*Communications Commission,* 83 U.S. App. D.C. 176, 170 F.2d 793, 801 (1948); *WBEN* v. *Federal Communications Commission,* 290 F.2d 743 (1961).

[2] 47 U.S.C. § 303(g).

Common Carrier, Rates, Charges
Competition, Common Carriers
Tariffs
Tariff, Filing and Posting of

**The Commission proposed that all tariffs which carriers treated by forbearance in the Competitive Carrier Rulemaking have on file with the Commission be cancelled and that no further tariffs be accepted for filing.**
–*Common Carrier Services*
CC Docket No. 79–252

FCC 84–82

BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| In the Matter of<br>Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor | CC Docket No. 79–252 |
|---|---|

# FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING

(Adopted: March 15, 1984; Released: March 22, 1984)

BY THE COMMISSION:

1. In the Competitive Carrier Rulemaking,[1] the Commission has adjusted its common carrier tariff and facilities regulatory requirements in light of the development of competition in interexchange telecommunications services. In the *First Report and Order* in this proceeding, the Commission streamlined the regulatory requirements applied to the specialized common carriers and the terrestrial resellers.[2] In the *Second Report and Order*, the Commission decided

---

[1] Policy and Rules Concerning Rates and Facilities Authorizations for Competitive Common Carrier Services (CC Docket No. 79–252), Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Report and Order, 91 FCC 2d 59 (1982), *recon.* FCC 83–69, released March 21, 1983; Second Further Notice of Proposed Rulemaking, FCC 82–187, released April 21, 1982; Third Further Notice of Proposed Rulemaking, Mimeo CC 33457, released June 14, 1983, 48 Fed. Reg. 28282 (June 21, 1983); Third Report and Order, Mimeo 012, released October 6, 1983; and Fourth Report and Order, FCC 83–481, released November 2, 1983, petitions for reconsideration filed December 19, 1983.

[2] The specialized common carriers are providers of terrestrial voice and data services. They include such carriers as: MCI Telecommunications Corporation,

to forbear from regulating tariffs and facilities of terrestrial resellers.[3] In the *Fourth Report and Order* the Commission found, after three years' experience with streamlined regulation, that for some carriers there was no evidence that even this minimal regulation regarding tariffs and facilities was necessary or useful to protect the public against unreasonable pricing practices or imprudent investments.[4] Accordingly, the Commission determined that it would forbear from requiring tariffs or facilities applications from the specialized common carriers and all resellers, including the domestic satellite resellers, resellers owned by or affiliated with exchange telephone companies, and domestic record carrier resellers not covered by the interconnection requirements of the Record Carrier Competition Act.[5] On the basis of this extensive record and for the reasons discussed below, we are here proposing that all tariffs which carriers treated by forbearance have on file with the Commission be cancelled and that no further tariffs be accepted for filing from those carriers.

2. Maintaining these documents at the Commission's offices entails certain costs such as the cost of storage space and the cost of staff time necessary to review the form of filed tariffs, to organize the materials for public inspection, to review special permission requests and to respond to questions from members of the public concerning the tariffs. More importantly, the presence of effective tariffs on Commission premises might mislead the public, state regulators and others to the belief that the FCC had, in fact, substantively evaluated them and found no objection. As the Commission stated in the *Second Report and Order*, the unnecessary application of traditional regulatory tools inhibits development of competition and results in unnecessary burdens inevitably borne by the consuming public. The elimination of these requirements would encourage the offering of services in greater diversity, more rapidly and at lower prices. Successful market performance, the Commission stated, should depend on carrier performance and not on an unintended Commission "stamp of approval." 91 FCC 2d at 72–73. The continued presence of tariffs at the Commission, by giving the appearance of

---

GTE-SPRINT, United States Transmission Systems, Inc., Goeken Comunications, Inc., and Western Telecommunications. Resellers are carriers that lease all of the circuits they use to provide service to their customers from underlying carriers.

[3] In response to the *Second Report and Order*, fifteen carriers cancelled the tariffs they had on file with the Commission.

[4] Carriers subject to streamlined regulatory requirements could file tariffs on 14 days' notice, the tariffs would be presumed to be lawful, and extensive cost support data would not be required. In addition, those carriers could, without advance authorization from the Commission, expand their facilities anywhere within the continental United States and discontinue service on 31 days' notice to the Commission.

[5] Pub. L. No. 97-130, 95 Stat. 1687 (1981). The Commission has not altered regulatory requirements applicable to international services. *See Fourth Report and Order*, para. 4 n. 5 and para. 37.

such a "stamp of approval," could well lull customers into believing that their own comparisons and evaluations of various service offerings were unnecessary and, thus, would inhibit the development of a vigorously competitive market. Since the rate levels and practices in these tariffs will no longer be analyzed by the Commission staff, it would seem to be unnecessary to continue to incur these costs and risks. Of course, no action of the Commission would prohibit any carriers from keeping these materials or any other materials regarding their service offerings, pricing policies and terms of service on file in a tariff format and available for public inspection at their own offices.

3. We are, therefore, proposing that all carriers subject to forbearance be required by a date certain to cancel their tariffs on file with this Commission by supplement effective upon five days' notice. We invite comment from interested parties on this proposal.

4. *REGULATORY FLEXIBILITY ANALYSIS*. By this Notice of Proposed Rulemaking, the Commission seeks to determine whether it is in the public interest to discontinue maintaining at the Commission tariffs of carriers over which the Commission is no longer exercising its regulatory jurisdiction as to rates and facilities. If adopted, this proposal would result in the cancellation of the tariffs of approximately 120 specialized common carriers and resellers of common carrier services. The proposal would eliminate all federal tariff filings by these companies. The proposal would not establish any additional federal rules requiring recordkeeping, reporting or other compliance measures. There are no other federal rules which overlap, duplicate or conflict with this proposal. There are no significant alternatives to this proposal which would accomplish the Commission's objective.

5. This proceeding is instituted pursuant to the provisions contained in 47 U.S.C. §§ 154(i) and 403.

6. Comments must be filed by April 30, 1984 and replies by May 15, 1984.

7. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who

makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must also state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally* Section 1.1231 of the Commission's Rules, 47 C.F.R. § 1.1231. All relevant and timely comments and reply comments will be considered by the Commission. In reaching its decision, the Commission may take into account information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

8. In accordance with the provisions of 47 C.F.R. § 1.1419(b), an original and six copies of all comments, replies, pleadings, briefs and other documents filed in this proceeding shall be furnished to the Commission. Members of the public who wish to express their views by participating informally may do so by submitting one or more copies of their comments, without regard to form (as long as the docket number is clearly stated in the heading). Copies of all filings will be available for public inspection during regular business hours in the Commission's Docket Reference Room (Room 239) at its headquarters in Washington, D.C. 1919 M Street, N.W.

9. IT IS HEREBY ORDERED that the Secretary shall cause this Fourth Further Notice of Proposed Rulemaking to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Application, for Review
Authority, Delegation of, by FCC
CATV Carriage, Mandatory Signals
Evidence, Presumptions
Forfeiture, Notice of Apparent Liability

Denied application for review of finding that cable system is obliged to carry mandatory signal. Presumption of adequate signal not rebutted by insufficient evidence. Compliance with order issued pursuant to delegated authority mandatory absent Commission stay. Notice of apparent liability for violations of rules to be issued.
*–Continental Cablevision of New Hampshire, Inc.*

FCC 84–85

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re:

| | |
|---|---|
| CONTINENTAL CABLEVISION OF NEW HAMPSHIRE, INC. | CSC-229 |
| Concord, New Hampshire | NH0020 |
| Boscawen, New Hampshire | NH0065 |
| Application for Review | |

## MEMORANDUM OPINION AND ORDER

(Adopted: March 15, 1984 Released: March 26, 1984)

BY THE COMMISSION:

1. On April 20, 1983, Continental Cablevision of New Hampshire, Inc. (hereinafter "Continental"), operator of a cable television system serving Concord and Boscawen, New Hampshire, pursuant to Section 1.115 of the Commission's Rules, filed an application for review of the action taken by the Chief of the Mass Media Bureau pursuant to delegated authority in *Continental Cablevision of New Hampshire, Inc.* (Concord, New Hampshire), Mimeo No. 3029, 53 RR 2d 747 (1983). WNNE-TV, Inc. (hereinafter "WNNE-TV"), licensee of Station WNNE-TV (NBC, Channel 31), Hartford, Vermont, has opposed Continental's application.[1]

---

[1] In addition, on May 3, 1983, WNNE-TV filed a letter to the Chief of the Mass Media Bureau, requesting the imposition of "appropriate sanctions" against

2. In *Continental Cablevision of New Hampshire, Inc.*, *supra*, the Chief of the Mass Media Bureau denied WNNE-TV's request for issuance of an order to show cause against Continental. At the same time, however, the Bureau Chief found that WNNE-TV was entitled, pursuant to Section 76.59(a)(3) of the Rules, to carriage on Continental's cable system, and that certain limited engineering data submitted by Continental was insufficient, pursuant to Section 73.686 of the Rules, to exempt Continental from its obligation to carry WNNE-TV's signal.[2] In addition, the Bureau Chief found that Continental had, by withdrawing a previously filed request for waiver of its obligation to carry WNNE-TV (CSR-1594), relinquished the automatic stay of this obligation which Continental had previously enjoyed. Accordingly, Continental was directed to inform the Commission within thirty days that Continental was in compliance with Section 76.59(a)(3) of the rules, or face the possibility of Commission sanctions.

3. In support of its application for review, Continental argues that the engineering evidence which it submitted to demonstrate that WNNE-TV does not in fact place a Grade B signal over Concord and Boscawen, New Hampshire, was sufficient to rebut "the presumption of Grade B coverage, based on coverage maps located elsewhere in the Commission's files. . . ." Continental argues that "substantial countervailing evidence" will rebut a presumption, citing *Legill v. Dan*, 544 F.2d 1, 4–7 (D.C. Cir. 1976); *Trader & General Insurance Co. v. Powell*, 177 F.2d 660, 665 (8th Cir. 1949); *Stone v. Stone*, 136 F.2d 761, 763 (D.C. Cir. 1943); Fed. R. Evid. 301: Section 1.351 of the Commission's Rules; and 9 J. Wigmore, Evidence §§ 2491–92 at 289–90 (3d ed. 1940). Continental asserts that WNNE-TV is merely presumed to place a Grade B contour over Concord and Boscawen, New Hampshire, and that Continental's "reliable and *uncontradicted* evidence . . ." has rebutted this presumption. Citing *KCST-TV, Inc. v. FCC*, 699 F.2d 1185 (D.C. Cir. 1983), Continental claims that the Bureau "acted arbitrarily and capriciously" in rejecting Continental's evidence.

4. WNNE-TV opposed Continental's application for review on May 3, 1983. WNNE-TV argues that the Bureau's reasoning for rejecting Continental's showing was adequate, citing the Bureau's listing of the deficiencies in Continental's showing, *Continental Cablevision of New Hampshire, Inc.*, 53 RR 2d at 749 n. 4. WNNE-TV

---

Continental, which replied to this letter on May 10, 1983. For the reasons stated in paragraph 6, *infra*, we believe that issuance of a Notice of Apparent Liability against Continental is appropriate. In addition, Continental replied to WNNE-TV's opposition to Continental's application for review on May 18, 1983. This pleading is not contemplated by Section 1.115(f) of the Rules, adds nothing of decisional significance, and will not be considered.

[2] The Bureau Chief also rejected Continental's challenge to the constitutionality of the cable television rules. Continental does not contest this rejection in its application for review.

contends that Continental "offers neither fact nor reason supporting its assertion that the Bureau's rejection of its engineering submission was wrong," and that Continental remains in violation of the Commission's signal carriage rules.

5. Continental fails to follow its own cited precedent. While a presumption may be rebutted, *e.g.*, by "evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence)," 9 J. Wigmore, Evidence § 2491 at 289 (3d ed. 1940), or by probative evidence, *Stone v. Stone*, 136 F.2d at 763, general allegations and inconclusive evidence are insufficient to overcome a presumption of adequate signal quality. *E.g.*, *Mohawk Valley TV* (Athol, Massachusetts), 28 2d 660 (1971); *Welch Antenna Co.* (Welch, West Virginia), 10 FCC 2d 675 (1967); *New England Video* (Keene, New Hampshire), 7 FCC 2d 231 (1967). As we have stated in similar contexts, "[O]ur pleading burden is strict, requiring submission of detailed measurements of signal quality." *Valley Telecasting Company* (Yuma, Arizona), 65 FCC 2d 926, 937 (1977) (footnote omitted). Continental's showing included several deficiencies, and was insufficient, pursuant to Section 73.686 of the Rules, to rebut the presumption that WNNE-TV places a Grade B contour over Concord and Boscawen, New Hampshire. As noted previously, Continental has failed to provide a map or grid detailing the location of the various measuring sites selected; it has not explained how it chose these sites; it provided no specific dates or information concerning relevant meteorological conditions during the measurements; and an insufficient number of points were measured. Continental cannot ignore the Commission's presumption in the absence of proof to the contrary, and channel the inquiry along lines of its own devising. Accordingly, the Bureau Chief did not err in his decision.

6. Continental has already been cautioned that "[it] may have believed its showing to be sufficient but should not have taken it upon itself to evaluate the showing and not carry the signal of WNNE-TV." *Continental Cablevision of New Hampshire, Inc.*, 53 RR 2d at 749. Continental has also been cautioned that prompt compliance with our rules was expected of it. *Id.* Continental, in its May 10, 1983, letter to the Bureau Chief, *see* note 1, *supra*, claims that the mere filing of an application for review stays the effectiveness of a decision issued pursuant to delegated authority, citing Sections 5(d)(3) and 5(d)(4) of the Communications Act of 1934, as amended, and also S. Rep. No. 576, 87th Cong., 1st Sess. 7 (1961).[3] The language which Continental cites, however, makes reference to a proceeding which has been reviewed, not to the mere filing of an application for review. *See also Quincy Cable TV, Inc.* (Quincy, Washington), 89 FCC 2d 1128 (1982), *recon. denied*, 53 RR 2d 201 (1983), *appeal docketed*, No. 83-1283 (D.C. Cir. March 16, 1983);

---

[3] These sections are now numbered 5(c)(3) and 5(c)(4).

Section 1.102(b)(3) of the Rules. In a letter filed on March 9, 1984, Continental states that it has commenced carriage of WNNE-TV and therefore believes that the matter is now moot. However, it is settled that subsequent corrective action does not mitigate a violator's liability. *E.g.*, *Liability of Clear-View Cable TV, Inc*(Pearisburg, Virginia), Mimeo No. 3748, ___ RR 2d ___ (1983), *review denied*, ___ FCC 2d ___ (1983), *recon. denied*, ___ RR 2d ___ (1984). Accordingly, in view of Continental's repeated violation of the Commission's signal carriage rules, the Chief of the Mass Media Bureau will issue a Notice of Apparent Liability to Continental in the amount of five thousand dollars ($5,000) for its willful or repeated violations of Section 76.59(a)(3) of the Commission's Rules.

7. In view of the foregoing, we find that grant of Continental's application for review is not in the public interest.

8. Accordingly, IT IS ORDERED, That the "Application for Review and Report" (CSC-229) filed April 20, 1983, by Continental Cablevision of New Hampshire, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

**Issues/Programs List**
**Public Inspection of Local Station File**

**Commission determined that the issues/programs list, currently required to be placed annually in the public file of a commercial radio broadcast station, should instead be prepared and made available to the public on a quarterly basis. The Commission also concluded that the existing limitation on the number of issues that may be included on the list should be removed.**
***–Deregulation of Radio***
**BC Docket No. 79–219**

**Issues/Programs List**
**Public Inspection of Local Station File**

**Commission no longer requires the commercial radio licensee to describe in the issues/programs list how it determined each issue to be one facing its community.**
***–Deregulation of Radio***
**BC Docket No. 79–219**

FCC 84–67

BEFORE THE
# FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

| In the Matter of<br>Deregulation of Radio | BC Docket No. 79–219<br>RM-3099<br>RM-3273 |
|---|---|

## SECOND REPORT AND ORDER
(PROCEEDING TERMINATED)

(Adopted: March 1, 1984; Released: April 27, 1984)

BY THE COMMISSION: Commissioner Rivera issuing a separate statement.

### *Introduction*

1. Now before the Commission for consideration are comments filed in response to the *Further Notice of Proposed Rule Making* ("*Further Notice*") in the above-captioned proceeding.[1] The *Further Notice* was issued in response to the partial remand by the United

---

[1] *Further Notice of Proposed Rule Making* in BC Docket No. 79–219, 48 Fed. Reg. 33499, published July 22, 1983.

States Court of Appeals for the District of Columbia Circuit of our initial decision in the radio deregulation proceeding and was strictly limited in its scope to the issues raised by the court.[2] Specifically, the *Further Notice* sought to determine the appropriate nature and extent of information regarding nonentertainment programming that we should require radio broadcasters to keep and to make available to the public and the Commission in view of the new regulatory scheme for commercial radio ushered in by this proceeding.

### *Background*

2. *The Report and Order*. In the *Report and Order* in this proceeding, the Commission deleted its guidelines regarding nonentertainment programming and commercial levels and eliminated both the ascertainment and program log keeping requirements for commercial radio stations.[3] In doing so, however, the Commission continued to recognize the obligation of commercial radio broadcasters to provide coverage concerning issues facing their communities. A station still is expected to address those issues that it believes are of importance to its community of license generally or, where programming serving many segments of the community is otherwise available, its own listenership. The method to be utilized in meeting this obligation is largely entrusted to the good faith discretion of each licensee. However, documentation is required as evidence of a licensee's compliance with its duty to provide issue-responsive programming. This takes the form of an issues/programs list that is intended to be exemplary in nature and is to be placed annually in each station's public inspection file. This list is to contain in narrative form a brief description of from five to ten issues to which the licensee gave particular attention with programming, together with a brief description of how the licensee determined each issue to be one facing its community and how each issue was treated. In addition, the list is to include information pertaining to the date and time of broadcast and the duration of listed programming.[4]

3. *The Court Decision*. On appeal, the court generally affirmed the Commission's radio deregulation decision, remanding for our

---

[2] *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983).

[3] *Report and Order* in BC Docket 79–219, 84 FCC 2d 968 (1981). In eliminating radio program log requirements, the Commission did not, nor does it presently intend to, alter the record-keeping obligations contained in Sections 73.932(d)(1) and (2), 73.961 and 73.962(e)(4) of the Rules. These regulations pertain to entries concerning emergency broadcast procedures required to be made by licensees in their station logs. See *Report and Order* in BC Docket No. 82–537, 48 Fed. Reg. 38473, published August 24, 1983.

[4] On reconsideration, the *Report and Order* was affirmed and clarified. *Memorandum Opinion and Order*, 87 FCC 2d 797 (1981).

further consideration only that part of our action eliminating the requirement that licensees maintain programming logs and make those logs available to the public. On remand, we were directed to give attention to the possible usefulness of revised programming logs as a valuable source of information in the newly-devised scheme of radio regulation.

4. In reviewing the Commission's rationale for deleting the former program logging requirements, the court concluded that:

> The Commission premised its decision . . . upon a straightforward cost-benefit analysis. First, the logs were found to be a "tremendous record-keeping burden." . . . Next, the Commission notes the low remaining marginal utility of these logs in light of its decisions to eliminate the nonentertainment programming and commercialization guidelines and to re-orient its focus to issue-oriented programming. . . . Finally, the Commission emphasized its "continued reliance on the public file as an index to the general programming responsibilities of licensees." . . . In the Commission's view, [the issues/programs list] and other available information will suffice to enable it and the public to oversee the general public interest responsibilities of licensees. 707 F.2d at 1439.

The court found no difficulty in accepting the Commission's analysis of the costs and benefits of regulating the record-keeping systems of licensees. In fact, it stated that such cost-benefit evaluations epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency. The court also found it reasonable to conclude that a logging requirement designed to make available certain information relevant under one regulatory scheme may be useless if transplanted unchanged to a new regulatory scheme. However, the court questioned whether the Commission had given adequate consideration to the potential benefits of imposing a revised comprehensive logging requirement—one designed, for example, to log information about issues and not categories of programming. While noting that the Communications Act does not compel the Commission to retain the program logging requirements, the court nevertheless expressed concern that a broader base of information than that provided by an annual issues/programs list may be needed to properly evaluate individual licensee performance under the new regulatory approach to commercial radio as well as to judge the success of radio deregulation in general.[5]

5. *The Further Notice of Proposed Rule Making*. The *Further Notice* elicited comments on the appropriate nature of a program

---

[5] The court noted that its concern for the adequacy of program-related information was heightened further by the Commission's concurrent rule making action adopting a simplified renewal application for radio and television broadcast licensees. In that action the Commission eliminated programming-related questions from the renewal application. On appeal at the time the court issued its opinion in the radio deregulation proceeding, the "short form" renewal decision was subsequently affirmed. *Renewal of License*, 46 Fed. Reg. 26236 (1981), *aff'd sub nom. Black Citizens for a Fair Media v. FCC*, Nos. 81-1710, 81-2277, Slip Op. (D.C. Cir., decided October 7, 1983).

record-keeping requirement for commercial radio broadcasters that would meet the court's concerns and provide the information necessary to satisfy our regulatory obligations with minimum burden on both the Commission and its licensees. Although we noted that options for fashioning such a requirement seemed to revolve around the placement in each station's public inspection file of a more complete record of a licensee's issue-oriented programming, we did not exclude retaining the issues/programs list as a viable option. In this regard, we did not read the court's decision as requiring the adoption of more detailed logging requirements than those initially adopted by the Commission in its *Report and Order*. Rather, we believed the court intended only that we should reexamine the logging issue with a more focused concern for our information needs and those of the public and provide a more closely reasoned justification for our ultimate choice in this area.[6] This is not to say, of course, that more comprehensive record-keeping obligations may not be appropriate. Indeed, the approach tentatively proposed in the *Further Notice* was the retention of an annual issues/programs list along with the creation of a new record of all issue-oriented programming.

6. In connection with our proposals, the *Further Notice* invited interested parties to comment on the following questions:

> (1) Should the Commission require a complete listing by time, date and duration of all nonentertainment programming or only of issue-responsive programming?
>
> (2) Should the Commission require a brief statement regarding the nature of the issue addressed in each program noted on the "log?"
>
> (3) At what intervals should the "log" have to be placed in the public file—weekly, monthly, quarterly, yearly, etc.?[7]
>
> (4) Should any new types of "log" be in lieu of, or in addition to, the issues/programs list?
>
> (5) What would be the estimated costs of keeping a comprehensive listing of issue-responsive programming?
>
> (6) What benefits would be conferred by our requiring commercial radio licensees to keep such a comprehensive listing?

We did not intend, by posing these questions, to restrict the scope of the comments submitted. As we stated in the *Further Notice* "these questions, of course, are suggestive rather than exhaustive. Commenting parties are invited to address other pertinent aspects of the logging issue as well."

---

[6] As Judge Bork stated in his concurring opinion: "We remand on the issue of program logs so that the Commission may reexamine the matter and provide a more thoughtful and detailed justification of whatever decision it may reach." 707 F.2d at 1443.

[7] Comments were solicited on the timing of the issues/programs list, as well as the issue-oriented program "log".

### *Comments*[8]

7. *Need for a Program Log.* Less than half of the commenting parties favor imposition of a supplementary logging requirement. Among commenters supporting an additional record-keeping obligation, the United States Catholic Conference ("USCC") argues that a broadcaster's self-selected "issues/programs" list is no substitute for a complete log of all material which it represents to be its response to community issues. Absent the availability of comprehensive program logs, asserts USCC, it is likely that most of the public will be discouraged from discharging or will be unable to discharge their watchdog role.

8. On the other hand, opponents are of the view that the appropriate response to the court's remand is for the Commission to reexamine the logging issue and provide a more complete and coherent rationale for its initial action in this matter. CBS Inc., argues that retention of the "issues/programs" list is entirely compatible with the thrust of the court's concerns. While a revised logging requirement would be burdensome and of little utility, it submits, retention of the existing list requirement places a reasonably limited burden and cost on both the Commission and its licensees. Further, that list provides the information necessary both for the Commission to satisfy its regulatory over-sight obligations and for the public to participate in the regulatory process. Retention of the system as it exists now, opponents contend, enables the Commission to continue its movement towards meaningful deregulation and not merely to exchange one set of regulations for another. Some commenters, such as the National Broadcasting Company, Inc. ("NBC"), also base their opposition to a new logging requirement on the tendency it would have to militate against adoption or continuation of formats that rely heavily on discussion of major local and national issues such as "all-news", "call-in" or "talk" formats.[9]

9. Rather than imposing a new logging requirement, American Broadcasting Companies, Inc. ("ABC"), as well as other commenters, recommend a modification of the present "issues/programs" list. They argue that while the court appears to view the 5–10 issue limit as too restrictive, the other extreme of requiring identification of all issues treated is neither necessary nor plausible. Accordingly, these

---

[8] A list of the parties filing comments and/or reply comments is contained in Appendix B.

[9] Although NBC argues that the Commission should reject the idea of requiring a "log," it submits that to the extent a contemporaneous record of issue-responsive programming may be necessary, we should allow radio licensees to substitute an audio type log in lieu of a written record.

commenters suggests that the Commission drop the current 5–10 issue limit and emphasize instead that licensees will be expected to list the *significant* issue-responsive programming that they provided over the course of the past year or six months.

10. *Scope of Logging Requirement*. The majority of commenters, whether in favor of or opposed to a new "log" requirement, recommend that any additional logging obligation be restricted to issue-responsive programming and exclude other nonentertainment broadcasts. These parties contend that a comprehensive listing of all nonentertainment programming goes far beyond the informational needs of the Commission's reduced regulatory program. USCC, the National Association for the Advancement of Colored People ("NAACP") and Henry Geller and Donna Lampert ("Geller"), however, suggest a "log" that would include all issue-responsive and other nonentertainment programs as well as public service announcements broadcast by the licensee to meet its public interest responsibilities.

11. As to what identifying information concerning a logged program should be required, most commenters agree that the date, time, and duration of the broadcast involved should be provided. However, there was some disagreement as to whether the issue or issues addressed by a listed program should be specified on the log. Some parties believe a brief statement of the issue covered, such as "local taxation", should be included. Others submit that licensees should not be put to task of identifying the exact nature of the issue or issues treated by a particular program, but should be obliged only to indicate the general subject matter involved. On this point, Broad Street Communications Corporation ("Broad Street") asserts that designating which issues are treated in programming is normally a responsibility of management level employees. By contrast, log preparation is normally a clerical task. If logs must list the issues which programs treat rather than simply record titles, topics or guests, management level employees could be drawn into log preparation, an allegedly inefficient use of personnel and resources.[10]

12. *Frequency of Filing*. Broadcasters generally suggest that any new "log" be placed in a radio station's public file on a semi-annual basis. NBC submits that with licensee renewal applications now being filed every seven years, the public has no earlier need for this information for renewal purposes. A few commenters, such as Broad Street, note that their prior experience with requests for inspection

---

[10] USCC would require that a "log" list not only the date, time, duration and issue or issues covered, which are the elements most commenters suggest, but also a description of the program format and the participants in the broadcast. The New Jersey Coalition for Fair Broadcasting even recommends that a "log" contain, among other things, the name of the program's producer and/or executive producer and a short summary of the program's content.

of program logs indicates that few, if any, requests will be made for inspection of modified logs. That being the case, it asserts, there is no need to burden licensees with requirements for more frequent placement of logs in public files. However, USCC and the New Jersey Coalition for Fair Broadcasting suggest that any new "log" be placed in a radio licensee's public file on a quarterly basis. In this regard, USCC contends that the best means of ensuring adequate responsive programming is to encourage an ongoing dialogue between a station and the public which it serves. This dialogue must be based, in USCC's view, upon factual information made frequently available to a station's listenership. USCC suggests that quarterly placement of a comprehensive nonentertainment programming log in the public file would meet this need. Geller, on the other hand, submits that the program "log" should be placed in the public file on an annual basis and that it should be given to the Commission at renewal time.

13. By contrast, WROK, Inc., argues that while "local public files" may seem desirable in a theoretical sense, such files in truth have not been relied upon by the public for informational purposes. Therefore, it sees no reason why issue-oriented programming records must be kept as part of a station's local public file. In lieu of such a requirement, WROK, the National Radio Broadcasters Association and others suggest that radio stations only be required to keep such records and to produce them upon reasonable request by a member of the public or by the Commission.

14. *Program Logs vs. Issues/Programs Lists*. USCC recommends that if comprehensive nonentertainment programming logs are to be made available every three months, licensees should not be obliged to prepare an "illustrative issues/programs list" as well. Geller agrees with USCC that issues/programs lists would not add materially to the information on the logs, but instead would merely repeat it. Broad Street also concurs, asserting that such lists would constitute duplicative and unnecessary paperwork and, therefore, should not be required. On the other hand, the National Association of Broadcasters ("NAB") suggests that the new "log" be maintained in addition to an "issues/programs" list, but a modified one. NAB would eliminate the "programs" portion of the list to avoid the duplication which would result were the new record of issue-responsive programming simply added to the existing "issues/programs" requirement. Finally, some commenters would require the new "log" in addition to the "issues/programs" list, while other parties once again argue against any new "log" whatsoever.

15. *Costs of Logging*. As to the costs of requiring radio stations to keep a comprehensive listing of issue-responsive programming, most broadcasters find them significant. Even though commercials would not have to be listed on the logs, asserts Broad Street, substantially all of the program information previously required would be included, as well as additional information necessary to identify

issues treated. Furthermore, CBS, Inc., argues that the compilation of such a list would involve many subjective and skilled judgments that could only be made by trained personnel. For example, CBS notes that to the extent issues were covered in news broadcasts, where stories were not preselected with a view toward meeting Commission requirements, time-consuming decisions would have to be made as to the nature of the issues addressed, as well as to whether the news story was sufficiently in-depth to qualify for inclusion. WROK, Inc., estimates that one additional staff member would be needed to maintain issue-based logs and that the salary and other costs associated with this personnel requirement would be substantial. CBS and NBC also believe that for stations with "all-news" or "all-talk" formats, the costs of preparing and maintaining a comprehensive "log" would be enormous. According to these parties, one of the significant costs of requiring maintenance of issue-oriented logs is the discouragement of the "all-news" or "all-talk" format.

16. However, Geller argues that the cost of program logging is a non-issue. Aside from the fact that the requirement can and should be restricted to public service programming, thus reducing the costs of compliance, he submits, as does NAACP, that radio licensees will continue to log their programming and incur the associated costs regardless of Commission requirements. The motivation to do so, Geller contends, is licensees' ongoing need to demonstrate that they have been operating in the public interest and to meet their commercial obligations.

17. *Benefits of Programming Logs.* With respect to the benefits of requiring a "log", some commenters assert that a comprehensive listing is the only sure way to predict the effect of the Commission's deregulatory actions and whether they will be of positive benefit to the public. USCC submits that this option would ensure that sufficient record-keeping is required of licensees to allow the Commission and the public to assemble data on which to base a valid analysis of individual station and industry wide performance. On the other hand, WROK, Inc., argues that the "comprehensive listing" proposed by the Commission would represent no value at all to either the radio station or to the Commission. It believes that a practical report on subject matter alone should satisfy both parties.[11]

---

[11] In its reply comments, NAB opines that most broadcast parties had advanced proposals similar to its own. Regardless of the characterizations used—"expanded annual issues/programs" list or an annual "issues list" supplemented by "issue-responsive programming information"—NAB submits that the gist of these comments is that the Commission should adopt a record keeping system which avoids redundancies, imposes only minimal paperwork burdens and affords substantial discretion to radio licensees.

## *Discussion*

18. The Court of Appeals said in remanding our decision to eliminate programming logs that it did so in order that we might "revisit the entire question of what information regarding radio nonentertainment programming must be made available to the public and to the Commission for the proper functioning of the new regulatory scheme." (707 F.2d 1442) The court specifically questioned how, in the absence of programming logs, the Commission would "obtain information to confirm its prediction that adequate amounts of nonentertainment programming will continue on radio." (*Id.*) It also questioned our reliance on the issues/programs list requirement as a source of such information, opining that "petitioners have presented a strong case that both the concerned citizen and the concerned Commissioner will find the issues/programs list to be woefully insufficient substitute for program logs." (*Id.*, at 1440–41) The court conceded that logging requirements irrelevant to the new regulatory scheme need not be retained, but insisted that "[t]he relevant question thus should be whether a *revised* comprehensive logging requirement—one designed, for example, to log information about *issues* and not *categories* of programming—might not produce benefits that would outweigh the recordkeeping costs." (*Id.*, at 1440).

19. As a threshold matter, we assume that the court did not intend to express a preference for logging as opposed to some other method of documentation suitable and adequate to our new regulatory scheme for radio broadcasting. The court clearly recognized and approved our decision to limit our regulatory concern under the new scheme to the "bedrock" obligation of radio broadcasters to cover public issues (707 F.2d 1430). To require licensees to log or otherwise document other nonentertainment programming, such as commercials, public affairs, or news, whose nature and quantity we have said will no longer concern us, would, in our judgment, serve no valid regulatory purpose. We therefore see no need to require documentation of nonentertainment programming other than issue responsive programming.

20. In the *Report and Order*, we found after an exhaustive analysis that marketplace forces at work today will elicit adequate amounts of non-issue responsive programming without regulatory intervention. If, in the future, there is significant market failure with respect to such programming, we are confident this will be brought to our attention by listener complaints or otherwise. Having been alerted to any problem which arises, we can document its scope by any of several means, such as special studies, investigations and temporary logging requirements, etc., and take whatever regulatory action is needed. We do not believe that to guard against such *possible*, almost certainly *limited* problems, we should now impose a *costlygeneral* logging requirement on our licensees.

21. We have therefore again given careful thought, as the court suggested we should, to the probable costs and benefits of various means by which radio licensees might adequately document their issue-responsive programming. While we have again decided not to impose a general logging requirement for this purpose at this time, in response to the court's concerns we have decided to expand the issues/programs list, as explained below. Under our *Report and Order* the proper inquiry into a broadcaster's performance will be centered on its efforts to program in response to those issues it deems important, rather than on *all issues* included in the broadcast schedule. Consequently, we do not find USCC's suggestion that we require only a comprehensive "log" or NAB's recommendation that we adopt a "log and issues-only list" approach persuasive or necessary to ensure compliance with our *Report and Order*. Rather, we continue to believe that the "issues/programs" list technique is best equipped to elicit the kind of purposeful programming information relevant to our current regulatory concerns. Nonetheless, we are persuaded that the quantity of information produced by the existing requirement—treatment of 5 to 10 issues annually—may be inadequate, particularly in these early stages of radio deregulation. With appropriate modification, however, we believe the "issues/programs" list approach to be entirely capable of providing the data needed both to evaluate licensees' individual performance and to monitor the effect of our action deregulating the commercial radio service.

22. As to costs of logging, commenters in this proceeding have asserted that logs containing information relevant to the new regulatory scheme would require involvement of management level staff and therefore be substantially more costly and burdensome than the simple traditional logs, which can be maintained by clerical staff. We have no reason to question these assertions, and they seem reasonable. The issue, therefore, is whether there is clear need under our new regulatory scheme for logging which is substantially more costly and burdensome than that required heretofore.[12]

23. As to benefits, we agree with the court that a logging requirement might be devised which could be useful to monitoring of licensees' fulfillment of their service obligation.[13] We are unable,

---

[12] We say "clear need" because, as we noted in our *First Report and Order*, even simple, traditional logs constitute a tremendous recordkeeping burden. In view of such recent legislation as the Regulatory Flexibility Act (5 U.S.C. § 601, *et seg.*) and the Paperwork Reduction Act (44 U.S.C. Chapter 35), we think we would flout the will of Congress if we imposed such a recordkeeping burden on radio broadcasters without clear evidence that it is needed under our new regulatory scheme, and no such evidence has been adduced in this proceeding or is otherwise known to us.

[13] We note, of course, that to the extent the system of record-keeping herein adopted also requires management involvement, it is more burdensome than a rote logging requirement. The burden appears consistent with the benefits. By

however, to reach the conclusion that there is no acceptable or better alternative source of information for this purpose. The new regulatory scheme imposes a basic issue-responsive programming responsibility on commercial radio licensees. An issues/programs list is a most useful vehicle to record a licensee's effort in this regard. An exhaustive log, perhaps necessary under the old regulatory requirements, is not needed to document the current program obligation which is directed to issues of concern to the community rather than to categories of programs.

24. The most significant source of issue-responsive information under the new regulatory scheme will be the issues/programs list. These lists will certainly contain more relevant information than traditional logs, which usually do not identify issues and issue-responsive programming. Since, as noted below, we are rescinding the 10-issue limit on these lists, we anticipate that broadcasters will probably use them to adequately document their significant issue-responsive programming, because doing so will serve their own self interest.

25. In the context of a routine license renewal, the existence of the issues/programs list in the station's public file and the absence of any contradictory evidence will give the Commission sufficient assurance that the station has met its issue responsive programming responsibility during the past licensee term to grant license renewal on that issue. In other contexts, such as when a programming issue is raised in a petition to deny or in a comparative renewal, these lists will serve as a significant source of information for any initial investigation by a member of the public or by the Commission. If in a particular case, a station's issues/programs lists do not provide sufficient information to resolve a substantial question of fact, the Commission may ask, as it has in the past, for more information from the licensee. The burden of proving that programming relevant to public issues has been provided is on the licensee. A broadcaster must demonstrate, if called on to do so, in a hearing or otherwise, that it has met its responsibility in this regard.

26. Another source of information regarding the performance of our radio licensees is the listening public. Complaints from listeners dissatisfied with radio service available to them have long aided our regulatory efforts, and we assume they will continue to do so. As to such complaints, we note the court's observation that programming logs have in the past been heavily relied on by petitioners to deny renewal of exising licenses. (707 F.2d 1441) We also note, however, that petitions to deny are rare and can be documented by other means. As the court itself noted, petitioners to deny could provide

---

requiring that the licensee sift through and refine raw programming material, we can reduce the paperwork burden, as compared to a comprehensive issue logging obligation, yet also provide more accessible and relevant documentation for the public.

their own documentation by monitoring the service of the station. (*Id.*) Any need for such monitoring would of course impose some burden on petitioners, but it would only be that of supplementing in a particular case the documentation available in the issues/programs lists of the station in question and others in its market. When such supplemental documentation is needed and supplied, it should be a helpful indicator of any need for reassessment of our new regulatory scheme. However, if experience in the future indicates that the public interest would be served by easing the documentation burdens of petitioners to deny at the cost of imposing logging requirements on radio licensees, we can revisit this issue.

27. In our view, any decision as to what documentation requirements will prove necessary under the new regulatory scheme is inherently a matter of judgment. After careful thought, we have again decided that no logging requirement is justified at this time, but this does not mean we are indifferent to the concern expressed by the Court of Appeals that the issues/programs list requirement imposed by the *Report and Order* may prove inadequate. To try to allay that concern, we have decided to modify this requirement in two respects.

28. The first modification we shall make is to eliminate the limitation that no more than ten issues be listed. After further reflection, we perceive no good reason why licensees who provide programming responsive to more than ten issues should be precluded from documenting this service in their issue/program lists.

29. The second modification we shall make is to require that these lists be prepared and made available quarterly, rather than annually. In our view there is no scientific way to determine how frequently these lists should be prepared and disclosed, and, as noted above, commenters varied considerably on this issue. We have decided in favor of quarterly reports because such more frequent reports will probably provide more, and will certainly provide fresher, information than annual reports, without fundamentally altering the reporting burden or increasing its cost. On balance, we believe the slight additional cost of this more frequent reporting will prove justified.

30. As a final matter, we note that licensees currently are expected not only to describe selected issues to which they gave particular attention with programming, how each issue was treated and the date, time and duration of the listed programming, but also to briefly describe how the licensee determined each issue to be one facing its community. In once again reviewing the adequacy of the issues/programs list, we have come to believe that this particular aspect of the obligation does indeed conflict with our decision that

the methodology utilized by licensees to become aware of the issues facing their community is not of concern to us.[14] It is the result and not the process that is of interest to us. We are not concerned with how an applicant or broadcaster becomes aware of community issues so long as such issues are identified and adequate responsive programming is offered or proposed. Given this focus and the significant steps we are taking today to enhance the availability of program-related data, we no longer believe that requiring a description and explanation of the means by which a licensee determines any given issue to be one facing its community is necessary, nor the burden incident to such a requirement warranted. Accordingly, we will no longer require that this information be included on the issues/programs list prepared quarterly by commercial radio licensees.

## *Regulatory Flexibility Analysis*

### *I. Need for and Purpose of Rule*

31. The Commission finds that strengthening the issues/programs list requirement will better enable the Commission and the public to evaluate a commercial radio broadcaster's public service record.

32. The additional burden imposed by an expanded issues/programs list requirement is limited in scope and warranted in view of the court's concerns that adequate information be available to the public and the Commission for review of a radio licensee's issue-responsive programming.

### *II. Summary of issues raised by public comment in response to the initial regulatory flexibility analysis, Commission assessment, and changes made as a result.*

A. ***Issues raised:***

33. A few parties favored the creation of a new record of all issue-oriented programming. They argued that such a "log" was necessary for the Commission to satisfy its regulatory oversight obligations and for the public to participate in the regulatory process. Some suggested retention of the "issues/programs" list in addition to this "log", while others believed the log would be adequate in and of itself as a programming record.

34. There were a number of parties who recommended retaining the present record-keeping requirement or a modification of it. They

---

[14] In the *Report and Order* we held that the public interest no longer required adherence to detailed ascertainment procedures. Rather, radio licensees were to be free to determine the issues facing their community that warranted programming consideration and could do so by any reasonable means.

**submit that a revised logging requirement would be burdensome and of little utility.**

**B. *Assessment:***

**35. The Commission concludes that the arguments favoring a strengthening of the annual "issues/programs" list as a record of a broadcaster's public service performance have merit as do those that find a "log" a too burdensome and unwarranted requirement.**

**36. We conclude that annual issues/programs lists may be an inadequate record of a broadcaster's programming responsive to community issues. Therefore, we modify the present requirement and mandate a quarterly preparation of the issues/programs list in its stead. We also remove the limitation on how many issues may be listed.**

C. *Changes made as a result of such comment:*

**37. Responding to comments, we have increased the record keeping obligation of commercial radio licensees, but not unduly burdened them.**

**38. In reply to commenters' requests, we eliminated the requirement to describe how the licensee determined each issue on the list to be one facing the community. We found that this duty conflicted with our resolve earlier in this proceeding that the methodology utilized by licensees to become aware of the issues facing their community is not of concern to us.**

**39. We adopted a suggestion that we eliminate the existing 10 issue limit on issues/programs lists to permit, though not require, licensees to document whatever significant issue-responsive programming they provide.**

## III. *Significant alternatives considered and rejected.*

40. The *Further Notice* tentatively proposed retaining the annual "issues/programs" list along with the creation of a new record of all issue-oriented programming. We rejected this alternative as being unduly burdensome and an inadequate source of information on which the Commission and the public could base an evaluation of a broadcaster's public service record.

41. Commenters' suggestions that only a "log" be retained or a "log" along with an issues-only list were also found to be inadequate tools for use by the public and the Commission in reviewing broadcast programming addressing community issues.

42. Authority for the action taken herein is contained in Sections 4(i) and (j) and 303 of the Communications Act of 1934, as amended.

43. Accordingly, IT IS ORDERED, that the Commission's Rules ARE AMENDED, effective ___ June 4, 1984, as described above and set forth in the attached Appendix A.

44. IT IS FURTHER ORDERED, that the Secretary of the Commission will publish this *Second Report and Order* in the FCC Reports.

45. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

46. For further information concerning this proceeding contact Freda Lippert Thyden, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

*Appendix B–may be seen in FCC Dockets' Branch, 1919 M Street, N.W. Wash., D.C..

## *Appendix A*

**Section 73.3526 is amended by revising subparagraph (a)(14) and paragraph (e) and adding a Note to read as follows:**

**§ 73.3526 Local public inspection file of commercial stations.**

**(a) * * ***

* * * * *

**(14) For AM and FM broadcast stations every three months a list of at least 5 to 10 community issues addressed by the station's programming during the preceding 3 month period. The list is to be filed the first day of each calendar quarter (*e.g.*, July 1, October 1, January 1 and April 1). The list shall include a brief narrative describing how each issue was treated, *i.e.*, public service announcements or programs, giving a description of the programs including time, date and duration of each program. These lists are to be retained for the entire license renewal period.**

**Note: The first quarterly filing is to include at least the past 3 months of a station's programming performance. If the last annual issues/programs list was filed more than 3 months prior to July 1, 1984, the licensee must place in its public inspection file an issues/programs list encompassing the period of time between its last annual filing and July 1, 1984.**

* * * * *

**(e) *Period of retention*. The records specified in paragraph (a)(4) of this Section shall be retained for periods specified in § 73.1940 (2 years). The manual specified in paragraph (a)(6) of this Section shall be retained indefinitely. The letters specified in paragraph (a)(7) of this Section shall be retained for the period specified in § 73.1202 (3 years). The "issues/programs" list specified in paragraph (a)(14) of this Section shall be retained for the term of license (7 years). The records specified in paragraphs (a)(1), (2), (3), (5), (8), (9), (11) and (12) of this Section shall be retained as follows:**

* * * * *

## SEPARATE STATEMENT
## OF
## COMMISSIONER HENRY M. RIVERA

RE: Modification of the Rule Requiring the Filing of the Issues/Programs List on an Annual Basis to Require the Placement of the List in a Commercial Radio Broadcaster's Public File on a Quarterly Basis.

I am satisfied that this *Memorandum Opinion and Order* adequately responds to the letter of the Court's remand order.[1] However, I would have been happier if our decision had been more responsive to the spirit of that order by providing clearer guidance about the license renewal process—both for citizens seeking to participate in the renewal process and for licensees seeking to comply with our rules. A number of pertinent questions remain unanswered. For instance, on what basis may a member of the public challenge the adequacy of a licensee's performance given the information specified in the licensee's issues/programs list?[2] How will a licensee show that its issue-responsive programming is sufficient to withstand a challenge?[3] I agree that these questions can be answered on an ad hoc basis as renewal challenges are filed and resolved but, until this body of case law has developed, our failure to detail the mechanics of the process will disadvantage both the public and licensees. Nevertheless, I am pleased that we have at least given the public and licensees the following guidance:

> 1) the issues/programs list will be the most significant vehicle for recording efforts to fulfill issue-responsive programming responsibilities;
>
> 2) licensees must adequately document their issue-responsive programming;
>
> 3) the programming list will serve as an initial frame of reference by the Commission to evaluate programming issues raised in a petition to deny or comparative renewal;
>
> 4) if listed programming is insufficient to address the issues listed, the Commission, can ask the licensee for more information;[4] and (most importantly),

---

[1] *See Office of Communications of the United Church of Christ* v. *Federal Communications Commission*, 707 F. 2d 1414 (D.C. Cir. 1983).

[2] For example, the Commission has not described the standard to be used to evaluate the relationship between the issues the licensee singles out and the programs listed as responsive to those issues. *See U.C.C.* v. *F.C.C.*, 707 F.2d at 1437 (1983). Obviously, there must be a demonstrable relationship if the issues/programs list is to serve any function.

[3] The Commission has not defined the role of the issues/programs list in gauging a renewal applicant's public interest performance when that performance has been challenged, or specified a "safe harbor" for licensees.

[4] *Memorandum Opinion and Order* paras. 23–25.

5) the burden of proving that the "bedrock" duty to air issue-responsive programming has been fulfilled is on the licensee.[5]

This guidance will, I believe, sufficiently illuminate the radio license renewal process for all concerned.[6]

---

[5] *Deregulation of Radio*, 49 R.R. 2d 1, 13, paragraph 34 (1981).

[6] *See Office of Communications of the United Church of Christ* v. *Federal Communications Commission*, 359 F. 2d 992 (D.C. Cir. 1966).

Equipment Authorization Program
Notification
Radio Frequency Device, Authorization

*Report and Order* adopted amending Parts 2, 5, 15, 21, 73, 74, 78, and 94 of Rules to change type of equipment authorization needed for certain categories of equipment. This would reduce amount of information required and time spent by applicants in obtaining approval of equipment in these categories.

*–Equipment Authorization*

Gen. Docket 83–10

FCC 84–21

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

| | |
|---|---|
| Amendment of the regulations to expand the notification and verification equipment authorization procedures. | Gen. Docket No. 83–10 |

## REPORT AND ORDER

(Adopted: January 19, 1984 Released: January 26, 1984)

BY THE COMMISSION: Commissioner Quello dissenting in part and issuing a statement.

1. On January 13, 1983, the Commission adopted a Report and Order in Gen. Docket 82-242, instituting a new form of equipment authorization known as notification.[1] That authorization procedure, along with the other forms of equipment authorization, is used to determine if equipment is capable of complying with the appropriate technical regulations. Such a determination must be made and a grant of authorization must be issued before the equipment can be marketed to the public, in accordance with Section 2.803 of the regulations (47 C.F.R. § 2.803). Notification differs from the other forms of equipment authorization in that the detailed measurement data and other information normally supplied with the application for authorization are not required unless specifically requested. However, the question of which types of equipment should be placed under notification was not addressed in Gen. Docket 82–242. It was stated that the inclusion of equipment under notification, along with

---

[1] Gen. Docket 82–242, Report and Order, released January 21, 1983, FCC 83–3, 48 FR 3614 published January 26, 1983.

an expansion of the application of the verification procedure, would be considered in separate rule making proceedings. The proposal for changing the applicable types of equipment authorization was the subject of the Notice of Proposed Rule Making in this proceeding.[2] A list of the affected equipment is included as Appendix A.

2. Since notification and verification do not normally require the submission of measurement data and the subsequent technical review, a number of the commenters have expressed their concern that some manufacturers, either through error or through intentional manipulation of the equipment design, would begin to produce equipment failing to comply with the regulations. This would increase the probability of the marketing of interference-causing equipment. Naturally, we are concerned at such a prospect. It is clear that the present system of carefully checking test data, circuit diagrams, and equipment capabilities is one designed to minimize the chance that interference-causing devices will be marketed. To the extent we move away from this detailed review, we are obviously taking a risk. Therefore, in addition to the exercise of caution in selecting equipment to be placed under verification and notification, we announced that the changes in authorization would be accompanied by a major increase in the sampling and testing of equipment. Thus, we believe that we have struck a proper balance between relieving the manufacturer's regulatory burden and protecting the public from harmful interference.

3. Equipment sampling, both before and after a grant of authorization, would have one important advantage over the testing of prototype equipment normally submitted for our scrutiny. Our sampling would test marketed equipment, in most cases, thereby obtaining a more accurate assessment of the performance of equipment actually used by the public. Further, the sampling program could be applied flexibily to the equipment types most prone to causing interference.

## *Comment and Discussion*

4. In general, the commenters agreed with the specific proposals made in the NPRM, given the establishment of an effective sampling program.[3] To the extent that questions or concerns were raised regarding specific proposals, these matters are discussed below.

### I. Verification:

5. The NPRM proposed to expand the use of verification for equipment which seldom undergoes complete or major design

---

[2] Gen. Docket 83–10, Notice of Proposed Rule Making, released January 21, 1983, FCC 83–4, 48 FR 4298 published January 31, 1983.

[3] A list of those filing comments and reply comments is included as Appendix B*, attached, along with the abbreviations used in this Order for discussion.

changes, which has already demonstrated that it does not cause harmful interference problems, and for which no major changes are expected in the type of radio service being offered. Accordingly, we proposed that, initially, television and FM broadcast receivers be included under verification.

A. Television Broadcast Receivers:

6. MST, while not directly opposing verification of television broadcast receivers, expressed its concern that such action would ". . . signal a weakening of the Commission's commitment to enforcement of its rules relating to receiver performance." Similarly, NAB stated that there is a need for continued vigilance in the area of UHF noise figure compliance. These concerns were expressed by the Commission in the NPRM. As stated in the NPRM, we will continue to enforce the all-channel regulations, the peak picture sensitivity standards and the UHF tuner noise figure requirement as well as the other requirements. We will continue to require the reporting to this Commission of the annual UHF noise figure performance report. Our expanded sampling program is one way we will determine if these rules are being violated. In addition, it is likely that a vigilant and highly competitive industry will be quick to bring violations to our attention. Thus, we can assure manufacturers and consumers that the receiver performance standards will continue to be enforced.

B. FM Broadcast Receivers

7. Mura suggested that certification be retained in the case of "personal" FM receivers—defined by Mura as receivers designed for personal, portable use and that include a headphone and a DC battery power source of three volts or less. Mura based its comment on its evaluation of imported FM receivers. They claim they have found that some of these receivers produced spurious emissions falling on frequencies throughout the 80 to 300 MHz region that are as great as ten times the levels permitted under Section 15.63 of the regulations. It is argued that the difficulty of complying with this regulation increases as the size of the receiver decreases and, further, that there is a motivation to market noncomplying receivers due to the cost of meeting the specified emission limitations. Mura also points out that interference problems have not resulted in the past because the technical review associated with certification has provided a reasonably high degree of assurance that the manufacturers of noncomplying receivers would not be successful in their attempts to obtain approval for their equipment. Under verification, by the time a sample of a particular model could be obtained and tested, mass market distribution could be well underway. Thus, Mura concludes that there appears to be a need for pre-marketing equipment review for these receivers.

8. While we are sympathetic to the concerns of Mura, our experience is that these receivers do not generate a high level of interference. There are hundreds of thousands of the type of receiver defined by Mura as well as other types of small, inexpensive FM receivers already in use by the public without significant interference problems. We are not convinced that the requirement for certification, by itself, has prevented the marketing and use of noncomplying receivers. As we have had a very limited sampling program for this equipment in the past, relying on the submitted measurement data for evaluation, a manufacturer who wished to market a cheaper, noncomplying receiver could easily have done so. Further, we feel that it is not the size of the receiver that relates to its ability to comply with our regulations but rather the cost of that equipment. Thus, any attempt to add an additional evaluation of FM broadcast receivers should concentrate on the lower cost receivers as opposed to receivers of a specific design style. An extremely large number of these lower cost receivers are already in use by consumers without a significant number of harmful interference problems.[4] Should interference problems develop in the future, our sampling efforts would be increased for this equipment and we would rely on the enforcement process to control the marketing of noncomplying equipment.

## II. Notification:

9. The equipment proposed for inclusion under notification was limited to low power transmitters which have generated little or no interference problems, certain receivers, fixed point-to-point transmitters, and most broadcast transmitters. Our proposal for the type of equipment to be included under notification was very selective in order to minimize any interference potential which could be caused by a decrease in the technical review of the equipment.

### A. Radio Receivers:

10. Under Part 15 of the rules (Radio Frequency Devices), we proposed notification for radio receivers in the frequency range of 30 to 890 MHz, excluding receivers associated with garage door openers and security alarm systems, all superregenerative receivers, and "scanners".[5] Comments were requested as to how "scanners" could be differentiated from receivers which scan a priority channel or FM broadcast receivers with "seek and scan" tuning capability. While no

---

[4] Usually, when an FM receiver fails to comply with the regulations it is due to a single frequency emission that does not substantially exceed our emission limitations. This may account for the lack of major interference problems. We would welcome any technical information from Mura explaining their concerns.

[5] "Scanners" were retained under certification because their emissions sweep through a broad range of frequencies increasing the likelihood of interfering with another radio service.

comments were received on this latter point, we have attempted to incorporate an appropriate definition in Part 15, retaining "scanners" under certification.

11. Only one comment was received on the inclusion of receivers under notification. OKI urged us to reconsider this portion of our proposal, suggesting the potential of interference to land mobile communications. However, we have not experienced any substantial interference problems from receivers with the exception of superregenerative receivers, scanners and receivers in the Citizens Band (CB) Radio Service. Those specific categories of receivers will be retained under certification. While OKI has not submitted any evidence to indicate that the remaining receiver types present a potential interference problem, we will increase our level of pre-grant and post-grant sampling as well as requiring, in some instances, the submission of measurement data before a grant of notification is issued for those receiver types which are discovered to cause interference. This action should suffice in continuing to keep interference from receivers to a minimum level. Therefore, we will place the specified receivers under notification, as proposed in the NPRM.

B. Fixed Point-to-Point Microwave Transmitters:

12. Fixed point-to-point microwave transmitters operated under rule Parts 21, 74, 78 and 94[6] were proposed for inclusion under notification because they are operated at specific locations, and therefore, any interference would be confined to a relatively small area.[7] Thus, it would be a simple matter to locate the source of the interference problems. Harris has requested that notification also be applied to mobile point-to-point microwave transmitters operated under Subpart F of Part 74 because some of the equipment used under that subpart is designed for both mobile and fixed operations. Harris was concerned that should the Commission approve a transmitter under notification, the user would be precluded from using that equipment for mobile operations. The user would have to determine the type of authorization under which the transmitter was approved to see if it could be used for mobile operation. Harris felt that this would require some equipment to obtain two forms of authorization: notification for fixed use and type acceptance for mobile use. However, this is not the case. We desire to retain mobile microwave transmitters under type acceptance, at least in the introductory stages of implementing notification, because of the

---

[6] Part 21—Domestic Public Fixed Radio Services; Part 74—Experimental Auxiliary, and Special Broadcast and Other Program Distributional Services; Part 78—Cable Television Relay Service; Part 94—Private Operational-Fixed Microwave Service.

[7] Part 74 television pickup stations and other mobile microwave operations were not considered for notification.

difficulty in locating this equipment should interference result. However, transmitters designed for both mobile and fixed operation will not be required to obtain two types of equipment authorizations. As shown in Section 2.904(d) in Appendix C, equipment authorized under type acceptance, certification or type approval is also considered to be authorized under notification. Therefore, the manufacturer of a transmitter designed for mobile or for both mobile and fixed operation need only obtain a grant of type acceptance.

13. At this point we would like to note that the recent Second Report and Order in General Docket 79-188[8] authorized the use of 18 GHz for aural broadcast STLs operated under Subpart E of Part 74. That Order required that a grant of type acceptance be obtained for the equipment. While the proposed rule changes in the NPRM to this proceeding did not mention this equipment as it had not yet been approved for operation, the NPRM did propose that fixed point-to-point microwave transmitting equipment under Part 74 be included under notification. We therefore feel that our earlier proposal also encompassed this fixed point-to-point 18 GHz equipment and have amended the regulations to allow approval under notification.

14. Harris has requested that further clarification be given to the proposed Section 2.975(a)(2)(v) which requires that the modulated emission utilized for microwave transmissions be described whenever an application for notification was filed.[9] Harris apparently felt that the wording of this rule section did not make it clear as to whether an emission designator was sufficient or if some additional explanation was needed. To avoid any possible confusion, we have changed the wording of that regulation to show that an explanation of the method of modulation is needed.

15. Harris also requested that the Commission require the filing of certain measurement data with an application for notification of a microwave transmitter in order to facilitate radio frequency coordination. Specifically, Harris has requested the filing of the transmitter frequency stability, power output limit, and the emission spectrum data in power density per unit bandwidth. It is argued that

---

[8] Gen. Docket 79-188, Second Report and Order, released September 30, 1983, FCC 83-392, 48 FR 50322 published November 1, 1983.

[9] At the present time, an applicant for an equipment authorization is required to submit an emission designator for the equipment. In many cases, that designator is not sufficient to accurately describe the type of modulation (for example, F9 relates to FM modulation of a type not described in the table of emission designators). When this happens, it is necessary for the Commission to contact the applicant and have him submit additional information to fully describe the type of emission employed. This is a common practice with microwave transmitters. In order to avoid the delay that would be caused by having to contact the applicant to submit additional information, this requirement is being placed in the regulations so that the applicant can be alerted before the application for notification is filed.

this information could be used in the process of new station licensing and could improve the ease of our sampling process. It should be noted immediately that the Commission already requires the submission of frequency stability and rated power output on the application for equipment authorization. We therefore assume that Harris is requesting merely the addition of the emission spectrum data. This request is rejected for a number of reasons. First, the concept of requiring, as a matter of routine, an applicant to submit measurement data whenever a "first time" application is made for a radio service was considered and dismissed an unnecessary in Gen. Docket 82–242.[10] Second, there is no need, on a routine basis, to compare this data with the data obtained from a sample. The sample would only be required to comply with the applicable regulations and would not have to meet or exceed the data obtained by the manufacturer prior to application for notification. Third, a potential licensee can certainly obtain this information from the equipment manufacturer. Thus, the additional paperwork and recordkeeping on the part of both the applicant and the Commission does not appear to be warranted.

## III. Other Equipment Categories:

16. Some comments to the NPRM requested that verification or notification be extended to cover additional equipment. We are not inclined to adopt those suggestions at this time. We have, as noted above, carefully selected the equipment proposed. Our reasons for selecting the equipment proposed are not applicable to the additional equipment suggested by the commenters. Until we have an opportunity to study our new procedures in practice, we do not believe further relaxation of our equipment authorization requirements is warranted. Nevertheless, this proceeding does not represent our final consideration of equipment to be place under either notification or verification. As we stated in paragraph 19 of the NPRM, "[o]nce both notification and the sampling program have become firmly established, it is possible that we would reconsider changing the required level of authorization for additional categories of equipment." We will therefore take into account any proposals made by the commenters in such future considerations.

## IV. Equipment Sampling:

17. The greatest number of comments expressed concern that the equipment sampling program be expanded as indicated in the NPRM. Indeed, most of those supporting the placement of certain equipment under notification or verification did so on the sole condition that the Commission increase its sampling of equipment.

---

[10] Gen. Docket 82–242, *op. cit.*, ¶ 14.

As stated by EIA/CEG and reiterated in the reply comment from Harris:

> "Consumers expect manufacturer compliance with existing FCC regulations. Manufacturers also depend upon the compliance of their competitors to assure fair product competition in the marketplace. FCC sampling may provide a cost-effective method of assuring compliance."

Harris, MST and NAB have urged us to make a commitment to allocate the necessary resources to institute and maintain a well-designed sampling program. Rockwell states that the sampling program must be strengthened to consider notification and that sampling of equipment actually marketed to the public (as opposed to laboratory prototypes) will improve our ability to determine effective equipment compliance. OKI urges us to increase our sampling for all radio equipment regardless of the type of equipment authorization. MST urges us to describe and give the public an opportunity to comment on the resources that would be devoted to the expanded sampling program and the enforcement sanctions we proposed to utilize. This request has been made only to determine if a sufficient effort would be applied to sampling. MST has stated that 1) "the Commission's commitment to expand its sampling . . . must not be simply an 'initial' commitment, but an ongoing one"; 2) "the Commission must make a public commitment that adequate resources will be provided for the sampling program to make it effective"; and 3) "in order to make the sampling program effective as a deterrent, the Commission should make a stronger commitment to enforcement of appropriate sanctions for violations of the regulations."

18. As noted earlier, to minimize the risk of harmful interference the actions taken today are premised on an expanded sampling program. Indeed, these actions have already taken personnel resources into account. It is neither appropriate nor helpful to submit for comment the question of precisely what level of resources we should apply. We intend to increase our level of sampling for all types of radio frequency equipment, regardless of the type of equipment authorization. Sampling will consist of both pre-grant and post-grant testing of equipment and may, in the case of equipment subject to notification or vertification, also consist of requesting and reviewing the measurement data demonstrating compliance with the regulations. The type of equipment to be sampled will be based on interference reports and data on equipment technical violations received from the Field Operations Bureau as well as other information obtained from trade shows, complaints from the public, and any other source of reliable information that may demonstrate a need to test specific equipment. We feel that our commitment will satisfy the concerns of those commenting.

## V. Enforcement:

19. Our marketing regulations require, with a few exceptions, that radio frequency devices subject to the technical standards in our rules comply with those standards when the devices are marketed.[11] In addition, if the rules require the device to have a grant of equipment authorization, our marketing rules require the manufacturer/vendor to obtain the appropriate equipment authorization as a prerequisite to marketing. The sampling program will be used to ensure that compliance with the appropriate regulations continues. The Communications Act of 1934, as amended (47 U.S.C. §§ 501–503), allows us some flexibility in prosecuting violations of the regulations. We intend to use this authority, especially the direct forfeiture authority contained in Section 503 and implemented in Section 1.80 *et seq.* of the Rules, to the greatest extent possible when noncompliance is found by our sampling program. This action, in combination with the ability to revoke a grant of authorization, should deter the entry into the marketplace of noncomplying equipment.

20. While NAB believes that the probability of a revocation of an equipment authorization encourages manufacturers to comply with our regulations, NAB, along with Harris and MST, also feels that once equipment has been purchased by consumers, there is no effective method of recalling these devices. We share this concern but point out that we are relaxing the type of equipment authorization only for those devices that would cause few interference problems. This, of necessity, has prevented a large number of consumer devices, other than certain receivers, from being included in this proceeding. In addition, should noncomplying devices be marketed, we have the authority to take forfeiture action not only against the manufacturer but against every party in the marketing chain down to the retail level. The threat of such action combined with attendant publicity has proved efficacious in the past. Thus, the degree of proliferation of noncomplying equipment can be minimized. Fortunately, the majority of equipment suppliers attempt to follow our regulations making these enforcement actions unecessary in most cases.

## VI. Implementation:

21. As stated in the NPRM, we intend to make these regulations effective at the earliest possible date. These rules will accelerate the issuance of an equipment authorization, will reduce the amount of paperwork required to be submitted to us, and will reduce our processing time for equipment authorizations. These rules will not affect the marketing or operational status of equipment approved under any earlier, more stringent equipment authorization. Applica-

---

[11] Subpart I, Part 2 of the Rules (47 C.F.F. § 2.801 *et seq.*)

tions already on file will be treated in the following manner: equipment subject to verification may be marketed as soon as the applicant is satisfied that the equipment complies with our regulations without waiting for further Commission response; equipment subject to notification must still obtain a grant of authorization prior to marketing but the application on file with the Commission will suffice as the application for notification if the original application is for the procedure required at the time of its filing, i.e., for type acceptance, certification or type approval.

22. *Final Regulatory Analysis*

I. Need for and objective of rules:

The rule changes shown in Appendix C will place equipment under the recently instituted notification equipment authorization procedure and under the existing verification procedure. The objective is to reduce the amount of time needed for an applicant to obtain an equipment authorization while, at the same time, allowing the Commission some flexibility with its staff resources. A sampling program will also be instituted to strengthen the equipment authorization program.

II. Summary of issues raised in comments on initial analysis:

No issues were raised in public comment or in the agency assessment.

III. Significant alternatives.

None.

*Rule Amendments*

23. The rules being adopted in this proceeding are shown in the attached Appendix C. These regulations are almost identical to those proposed in the earlier notice in this docket with the exception of some changes for clarification and to clear up some ambiguities discovered since the release of the NPRM. A number of benefits to the manufacturer, and ultimately the consumer, include the ability to market equipment at an earlier date and the savings produced from this earlier marketing, the ability to plan more effectively a marketing penetration date, and the deletion of the submission of a measurement data report to the Commission. At the same time, the Commission will be able to concentrate its resources in the areas of the equipment authorization program where they are most needed, i.e., equipment sampling and reduction of equipment authorization application backlog.

*Conclusion*

24. In view of the foregoing, we find that the amended rules as shown in the attached Appendix C are in the public interest,

convenience and necessity. The authority for these amendments is contained in Sections 4(i), 302, 303(e), 303(f) and 303(r) of the Communications Act of 1934, as amended. Accordingly, IT IS ORDERED, effective March 5, 1984, that Parts 2, 5, 15, 21, 73, 74, 78 and 94 are AMENDED as set out in Appendix C and that all other requests for amendments, as detailed above, are DENIED. IT IS FURTHER ORDERED that the proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

* Appendix B may be seen in FCC Dockets Br., Room 239, Washington, D.C. 20554.

## APPENDIX A

**The following is a summary of the changes in equipment authorization:**

| *Rule Part* | *Category of Equipment* | *Former Authorization* | *New Authorization* |
|---|---|---|---|
| 5 | Wildlife tracking transmitters | Type acceptance | Notification |
| | Ocean buoy tracking and telemetry transmitters | Type acceptance | Notification |
| 15 | Receivers from 30 to 890 MHz *excluding* superregenerative receivers, TV and FM broadcast receivers and scanners | Certification | Notification |
| | TV and FM broadcast receivers | Certification | Verification |
| 21 | Fixed point-to-point microwave transmitters | Type acceptance | Notification |
| 73* | AM antenna phase monitors | Type approval | Notification |
| | Broadcast transmitters | Type acceptance | Notification |
| 74 | Fixed point-to-point microwave transmitters | Type acceptance | Notification |
| 78 | Fixed point-to-point microwave transmitters | Type acceptance | Notification |
| 94 | All microwave transmitters | Type acceptance | Notification |

***AM stereophonic exciter-generators and encoders for the Emergency Broadcast System (EBS) are retained under type acceptance. Decoders for the EBS are retained under certification.**

## APPENDIX C

A. Title 47 of the Code of Federal Regulations, Part 2, is amended as follows:

1. The Table of Contents is amended by deleting Sections 2.911, 2.912 and 2.913.

2. Section 2.904 is amended by adding a new paragraph (d) to read as follows:

Section 2.904 *Notification.*

* * * * *

(d) For equipment which requires a grant of notification, authorization under type acceptance, type approval, or certification shall be deemed to constitute authorization of the equipment under notification.

3. Sections 2.911, 2.912 and 2.913 are deleted.

4. Section 2.975 is amended by adding a new subparagraph (a)(2)(v) and by revising subparagraphs (a)(2)(iii) and (a)(2)(iv), to read as follows:

Section 2.975 *Application for notification.*

(a) * * *

(1) * * *

(2) * * *

(i) * * *

(ii) * * *

(iii) Rated frequency tolerance (if applicable);

(iv) Rated radio frequency power output, if applicable (if variable, give the range); and

(v) If the equipment is a microwave transmitter, an explanation of the type of modulation employed and of the resulting emission.

* * * * *

5. Section 2.977 is amended by adding a new paragraph (c), to read as follows:

Section 2.977 *Changes in notified equipment.*

* * * * *

(c) Notwithstanding the provisions of paragraph (b) of this Section, permissive changes to transmitters notified for operation under Part 73 of this Chapter include the following:

(1) The interfacing of a type accepted AM broadcast stereophonic exciter-generator with a notified AM broadcast transmitter in accordance with the manufacturer's instructions and upon completion of equipment performance measurements showing that the modified transmitter meets the minimum performance requirements applicable thereto.

(2) The interconnection of a utility load management exciter with a notified AM broadcast transmitter in accordance with the manufacturer's instructions and completion of equipment performance measurements showing the transmitter meets the minimum performance requirements applicable thereto.

(3) The addition of FM broadcast subcarrier generators under the provisions of §§ 73.293, 73.319 and 73.1690 of Part 73 of the Rules to a notified FM

broadcast transmitter provided the transmitter exciter is designed for subcarrier operation without mechanical or electrical alterations to the exciter or other transmitter circuits.

(4) The addition of FM stereophonic sound generators under the provisions of §§ 73.297, 73.597 and 73.1690 of Part 73 of the Rules to a FM broadcast transmitter notified for stereophonic operation provided the transmitter exciter is designed for stereophonic sound operation without mechanical or electrical alterations to the exciter or other transmitter circuits.

(5) The addition of subscription TV encoding equipment for which the FCC has granted advance approval under the provisions of § 2.1400 in Subpart M and § 73.644(c) of Part 73 of this Chapter to a notified transmitter.

B. Title 47 of the Code of Federal Regulations, Part 5, is amended as follows:

1. Section 5.109 is revised to read as follows:

Section 5.109 *Acceptability of transmitters for licensing.*

All transmitters used at stations licensed for wildlife and ocean buoy tracking and telemetering operations pursuant to § 5.108 shall be type accepted or notified pursuant to Subpart J of Part 2 of this Chapter. After March 5, 1984, only grants of notification will be issued for equipment authorized for use in this service.

C. Title 47 of the Code of Federal Regulations, Part 15, is amended as follows:

1. The Table of Contents is amended by deleting Section 15.81, by adding a new Section 15.36, and by revising the title of Sections 15.69, 15.71, 15.72, 15.235, and 15.345, to read as follows:

## PART 15 - RADIO FREQUENCY DEVICES

* * * * *

### Subpart B - Administrative Provisions

15.32 * * *

* * * * *

15.36 Notification.

* * * * *

15.49 * * *

### Subpart C - Radio Receivers

15.59 * * *

* * * * *

15.69 Equipment authorization for a receiver.

15.70 * * *

15.71 Identification of a receiver.

15.72 Date when an equipment authorization is required.

* * * * *

15.82 * * *

* * * * *

Subpart E - Low Power Communication Devices: Specific Devices

15.151 * * *

* * * * *

15.235 Equipment authorization requirement.

* * * * *

15.237 * * *

* * * * *

Subpart G - Auditory Assistance Devices

15.331 * * *

* * * * *

15.345 Authorization of a receiver.

* * * * *

15.377 * * *

* * * * *

2. Section 15.4 is amended by adding a new paragraph (t) to read as follows:

Section 15.4 *General definitions.*

* * * * *

(t) *Scanning receiver.* For the purpose of this rule part, this is a receiver which automatically switches between four or more frequencies in the range of 30 to 890 MHz and which is capable of stopping at and receiving a radio signal detected on the frequency. Receivers designed solely for the reception of the broadcast services under Part 73 of the regulations are exempted from this definition.

3. A new Section 15.36 is added to read as follows:

Section 15.36 *Notification.*

When the rules in this Part require a device to be notified, application therefor shall be filed on FCC Form 731 pursuant to the procedures set out in Subpart J of Part 2 of this Chapter.

4. Section 15.41 is amended by revising paragraph (a) to read as follows:

Section 15.41 *Identification of an authorized device.*

(a) Each device authorized under a grant of equipment authorization issued by the Commission under this Part shall be labeled pursuant to Subpart J of Part 2 of this Chapter.

* * * * *

5. Section 15.46 is amended by adding a new paragraph (d) to read as follows:

Section 15.46 *Photographs required.*

* * * * *

(d) Photographs are not required for equipment subject to notification or verification, unless specifically requested.

6. Section 15.49 is amended by adding a new paragraph (c) to read as follows:

Section 15.49 *Changes in an authorized device.*

* * * * *

(c) Changes in a notified device may be made pursuant to § 2.977 of Part 2 of this Chapter.

7. Section 15.66 is amended by revising paragraphs (b) and (c) and sub-paragraphs (b)(1) and (b)(2), to read as follows:

Section 15.66 *All-channel television broadcast reception: Noise figure.*

* * * * *

(b) *Noise figure to be compiled by the manufacturer.*

(1) The manufacturer shall measure the noise figure of a number of UHF channels of the test sample to give reasonable assurance that the UHF noise figure for each channel complies with the limits in paragraph (a) of this section.

(2) The manufacturer shall insert in his files a statement explaining the basis on which he will rely to insure that at least 97.5 percent of all production units of the test sample that are manufactured have a noise figure within the limits in paragraph (a) of this section.

(c) *Followup proof of performance for a TV receiver certificated or verified after October 1, 1979.* Within one year after a specific TV receiver model has been certificated or verified, the manufacturer shall file a report giving the actual UHF noise figure performance of units of that model actually measured during that year. In the case of verified equipment, the report may be filed by the manufacturer or, alternatively, by the party responsible for the marketing of that model in this country.

(d) * * *

8. Section 15.69 is amended by revising the title and text to read as follows:

Section 15.69 *Equipment authorization for a receiver.*

(a) Each radio receiver that tunes (operates) on a frequency between 30 to 890 MHz and each CB receiver, as defined in Section 15.59, shall have the necessary equipment authorization as listed in paragraph (b) below to show compliance with the technical specifications of this Part. The equipment authorization is a prerequisite of marketing, pursuant to Subpart I of Part 2 of this Chapter.

(b) The necessary form of equipment authorization is listed below:

| | *Type of Receiver* | *Equipment Authorization Required* |
|---|---|---|
| 1. | TV broadcast receiver | Verification |
| 2. | FM broadcast receiver | Verification |
| 3. | CB receiver | Certification |
| 4. | Receiver using superregenerative circuitry | Certification |
| 5. | Receiver, regardless of the type of circuitry, associated with a garage door opener or a security alarm system | Certification |
| 6. | Scanning receiver | Certification |
| 7. | All other receivers subject to Part 15, Subpart C | Notification |

(c) For details concerning the several types of equipment authorizations, see Part 2, Subpart J of this Chapter.

9. Section 15.70 is amended by revising the introductory sentence, to read as follows:

Section 15.70 *Comparability of tuning information to be submitted pursuant to § 15.45(b).*

In the case of a television receiver designed to meet the requirements of § 15.68, the information required by § 15.45(b) shall include the material listed below. For a television receiver subject to verification, this information need not be reported to the Commission unless specifically requested.

* * * * *

10. Section 15.71 is amended by revising the title and text to read as follows:

Section 15.71 *Identification of a receiver.*

(a) A receiver subject to notification or certification in accordance with §15.69 shall be identified pursuant to §§ 2.925, 2.926, 2.979, and 2.1045 of this Chapter.

(b) Receivers subject to verification must be uniquely identified but do not need to follow a format specified by the Commission. The FCC identifier, as defined in § 2.926 of this Chapter, shall not be used on verified receivers.

11. Section 15.72 is amended by revising the title and by adding new subparagraphs (a)(4) and (b)(3), to read as follows:

Section 15.72 *Date when an equipment authorization is required.*

(a) * * *

(1) * * *

(2) * * *

(3) * * *

(4) A television receiver manufactured after March 5, 1984 ___ shall continue to comply with the requirements of this Section except that receiver shall be subject to verification instead of certification.

(b) * * *

(1) * * *

(2) * * *

(3) A receiver manufactured after March 5, 1984 shall be subject to the form of equipment authorization specified in Section 15.69.

12. Section 15.75 is amended by revising the introductory sentence in paragraph (b) to read as follows:

Section 15.75 *Measurement procedure.*

* * * * *

(b) The following methods of measurement are considered acceptable procedures for testing receivers to demonstrate compliance with the requirements of this subpart:

* * * * *

13. Section 15.76 is amended by revising the introductory sentence and paragraph (a), to read as follows:

Section 15.76 *Report of measurements: FM broadcast receiver.*

When specifically requested by the Commission to submit a report of measurements for a FM broadcast receiver or the FM broadcast band in a multiband broadcast receiver, that report shall include the following:

(a) Specific identification of the receiver that was measured including the name and address of the manufacturer, the company responsible for ensuring compliance under verification (if different), the trade name (if any), the model number and the serial number (if any).

* * * * *

14. Section 15.77 is amended by revising the introductory sentence and paragraph (a), to read as follows:

Section 15.77 *Report of measurements: TV receiver.*

When specifically requested by the Commission to submit a report of radiated and conducted emission measurements for a TV broadcast receiver or the TV band in a multiband broadcast receiver, that report shall include the following:

(a) Specific identification of the receiver that was measured including the name and address of the manufacturer, the name of the company responsible for ensuring compliance under verification (if different), the trade name (if any), the model number, and the serial number (if any).

* * * * *

15. Section 15.78 is amended by revising the introductory sentence to read as follows:

Section 15.78 *Report of measurements: Multiband broadcast receiver.*

When specifically requested by the Commission to submit a report of measurements for a multiband broadcast receiver, i.e., a receiver that includes reception capability in communications bands as well as in one or more broadcast bands, that report shall include the following:

* * * * *

16. Section 15.79 is amended by revising the introductory sentence and paragraph (a), to read as follows:

Section 15.79 *Report of measurements: Receivers other than FM or TV.*

The report of measurements for a receiver other than a FM or TV broadcast receiver and for each band in the range 30–890 MHz in a multiband broadcast receiver shall include the information listed below if the receiver is subject to certification pursuant to Section 15.69. If the receiver is subject to notification or verification, that report of measurements, including the information listed below, shall be submitted to the Commission only if it is specifically requested.

(a) Specific identification of the receiver that was measured including the name and address of the manufacturer, the name of the applicant for an equipment authorization or, in the case of verification, the name of the company responsible for ensuring compliance of the equipment (if different from the manufacturer), the trade name (if any), the model number and the serial number (if any).

* * * * *

17. Section 15.81 is deleted.

18. Section 15.82 is revised to read as follows:

Section 15.82 *Interference from a radio receiver.*

The operator of a radio receiver, regardless of tuning range, date of manufacture, or equipment authorization, which causes harmful interference shall promptly take steps to eliminate the harmful interference.

19. Section 15.177 is amended by revising paragraph (d) to read as follows:

Section 15.177 *Equipment authorization required.*

* * * * *

(d) The receiver associated with a radio telemetering device must be certificated or notified, as shown in Section 15.69, pursuant to Subpart B to show compliance with Subpart C of this Part.

20. Section 15.235 is amended by revising the title and text to read as follows:

Section 15.235 *Equipment authorization requirement.*

Both the base station and portable handset of a cordless telephone shall be authorized by the Commission pursuant to the procedures in Subpart J of Part 2. Authorization is a prerequisite for legal marketing and use. The transmitter portion of the cordless telephone shall be certificated to show compliance with the requirements in §§ 15.231–15.237, inclusive. The receiver portion shall be notified to show compliance with the requirements in Subpart C of this Part. A single application for certification and notification *(FCC Form 731)* may be filed for a cordless telephone system provided it clearly identifies and provides data for all parts of the system to show compliance with the applicable technical requirements.

NOTE: A cordless telephone, which is intended to be connected to a public telephone network shall also comply with regulations in Part 68 of this Chapter. A separate application for registration under Part 68 is required.

21. Section 15.236 is revised to read as follows:

Section 15.236 *Labelling and identification requirements for a cordless telephone.*

Both the base station and portable handset of a cordless telephone system shall be identified and labelled pursuant to §§ 2.925, 2.926, 2.979 and 2.1045 of Part 2 of this Chapter. In addition, the label attached to the cordless telephone base station shall contain the following statement:

> "This cordless telephone system operates under Part 15 of FCC Rules. Privacy of communications may not be ensured when using this phone. Operation is subject to two conditions: 1) it may not interfere with radio communications; and 2) it must accept any interference received, including that which may cause undesirable operation."

When a single application for certification and notification of a cordless telephone system is submitted in accordance with § 15.236, both the base station and protable handset may carry the same FCC Identifier.

22. Section 15.333 is amended by revising paragraph (b) to read as follows:

Section 15.333 *Operation in the band 72–76 MHz.*

(a) * * *

(b) A receiver may be operated as part of an auditory assistance system provided it meets the technical specifications in §§ 15.361–15.367 inclusive and is approved pursuant to § 15.345.

23. Section 15.335 is amended by revising paragraph (a) to read as follows:

Section 15.335 *Operation in the band 88–108 MHz.*

(a) An auditory assistance system may be operated in the band 88–108 MHz provided the transmitter meets the technical specifications in § 15.162 (a), (b), (c) and (d), the receiver meets the technical specifications in § 15.63, the transmitter is certificated, and the receiver is certificated or notified pursuant to the provisions of § 15.69.

(b) * * *

24. Section 15.337 is revised to read as follows:

Section 15.337 *Operation on other frequencies.*

(a) An auditory assistance system may be operated on any frequency available under this part: *Provided*, The transmitter and receiver parts of the system meet the applicable technical specifications of this Part and have obtained the necessary equipment authorizations.

(b) An auditory assistance system may be operated as a licensed station in an authorized radio service: *Provided*, The transmitter meets the applicable regulations of such service and is type accepted and the receiver is approved pursuant to § 15.345.

25. The title and text of Section 15.345 are revised to read as follows:

Section 15.345 *Authorization of a receiver.*

A receiver operating in the range 30–890 MHz as part of an auditory assistance system shall be certificated or notified as shown in § 15.69 pursuant to Subpart B of this Part to show compliance with the technical specifications of this subpart.

26. The text of Section 15.375 is revised to read as follows:

Section 15.375 *Identification of auditory assistance equipment (72–76 MHz).*

Each transmitter and each receiver operated as part of an auditory assistance system in the band 72–76 MHz for which applications for an equipment authorization are filed on or after May 1, 1981 shall be individually identified pursuant to §§ 2.925, 2.926, 2.979 and 2.1045 of this Chapter. The FCC Identifier for such equipment will be validated by the grant of equipment authorization issued by the Commission. The nameplate or label of the transmitter and receiver shall contain the following statement:

This device complies with FCC Rules Part 15. Operation is subject to the following two conditions: (1) This device may not cause harmful interference and (2) this device must accept any interference that may be received including interference that may cause undesired operation.

D. Title 47 of the Code of Federal Regulations, Part 21, is amended as follows:

1. The Table of Contents is revised by changing the title of Section 21.120 to "Authorization of transmitters."

2. Section 21.120 is amended by revising the title and paragraphs (a), (b) and (c), to read as follows:

Section 21.120 *Authorization of transmitters.*

(a) Except for transmitters used at developmental stations or for fixed point-to-point operation pursuant to Subpart I, each transmitter shall be a type which has been type accepted by the Commission for use under the applicable rules of this Part. Transmitters used in the point-to-point microwave service under Subpart I for fixed operation shall be of a type which has been either notified or type accepted by the Commission (see Section 2.904(d) of this Chapter). Effective March 5, 1984, only grants of notification will be issued for transmitters used exclusively for fixed point-to-point operation.

(b) Any manufacturer of a transmitter to be produced for use under the rules of this Part may request type acceptance or notification by following the applicable procedures set forth in Part 2 of this Chapter. Type accepted and notified transmitters are included in the Commission's Radio Equipment List. Copies of this list are available for inspection at the Commission's office in Washington, D.C. and at each of its field offices.

(c) Type acceptance or notification for an individual transmitter may also be requested by an applicant for a station authorization, pursuant to the procedures set forth in Part 2 of this Chapter. An individual transmitter will not normally be included in the Radio Equipment List but will be enumerated on the station authorization.

* * * * *

E. Title 47 of the Code of Federal Regulations, Part 73, is amended as follows:

1. The Table of Contents is revised by changing the title of Section 73.53 to "Requirements for authorization of antenna monitors." and by changing the title of Section 73.1660 to "Acceptability of broadcast transmitters."

2. Section 73.44 is amended by revising the introductory sentence of paragraph (a) to read as follows:

Section 73.44 *AM transmission system emission limitations.*

(a) Stations using main transmitters type accepted or notified after January 1, 1960 must meet the following emission limitations:

* * * * *

3. Section 73.51 is amended by revising subparagraph (c)(2) to read as follows:

Section 73.51 *Determining operating power.*

* * * * *

(c) * * *

(1) * * *

(2) A showing that the transmitter has been type accepted or notified for operation at the proposed power output level, or, in lieu thereof:

* * * * *

4. Section 73.53 is amended by deleting paragraph (b), designating it as [Reserved], and by revising the title, paragraph (c) and subparagraphs (a)(1), (a)(2), (c)(9) and (c)(11), to read as follows:

Section 73.53 *Requirements for authorization of antenna monitors.*

(a) General requirements:

(1) Antenna monitors shall be type approved or notified by the FCC. Effective March 5, 1984, only grants of notification will be issued for antenna monitors.

(2) Notification can be obtained by following the procedures specified in Subpart J of Part 2 of the FCC's Rules.

(b) [Reserved]

(c) An antenna monitor eligible for authorization by the FCC shall meet the following specifications:

* * * * *

(9) The monitor, if intended for use by stations operating directional antenna systems by remote control or using extension meters to observe the monitor indications, shall be designed so that the switching functions required by subparagraph (c)(7) of this Section may be performed from a point external to the monitor and phase and amplitude indications be provided by external meters. The indications of external meters furnished by the manufacturer shall meet the specifications for accuracy and repeatability of the monitor itself, and the connection of these meters to the monitor, or of other indicating instruments with electrical characteristics meeting the specifications of the monitor manufacturer shall not affect adversely the performance of the monitor in any respect. The type approval or notification designations and the instruction manuals for monitors not designated for external switching of the indications as specified in this Paragraph shall clearly show that the monitors are not acceptable for use at stations using remote control for the operation of directional antennas or extension meters to read and log the monitor indications.

(10) * * *

(11) The monitor must be accompanied by complete and correct schematic diagrams and operating instructions when submitted for type approval. When approved under notification, these materials shall be retained by the applicant and not submitted unless otherwise requested by the FCC. For the purpose of the equipment authorization, these diagrams and instructions shall be considered as part of the monitor.

* * * * *

5. Section 73.68 is amended by revising paragraph (b) to read as follows:

Section 73.68 *Sampling systems for antenna monitors.*

* * * * *

(b) Each license or modified license issued pursuant to an application containing a satisfactory showing that a sampling system has been constructed complying with the requirements set forth in Paragraphs (a)(1) and (2) of this Section, and that an antenna monitor of a make and type approved or notified by the FCC has been installed, will be conditioned to exempt the licensee from compliance with the rules which require:

* * * * *

6. Section 73.69 is amended by revising paragraph (a) and subparagraph (a)(2), to read as follows:

Section 73.69 *Antenna monitors.*

(a) Each station using a directional antenna must have in operation at the transmitter site an FCC authorized antenna monitor. However, if the station authorization sets specific tolerances within which the phase and amplitude relationships must be maintained, or requires the use of a monitor of specified repeatability, resolution or accuracy, the antenna monitor used will be authorized on an individual basis.

(1) * * *

(2) The antenna monitor installed at a station operating a directional antenna by remote control, using extension meters to read and log the monitor indications, or when the monitor is installed in the antenna field at a distance from the transmitter, must be designed and authorized for such use in accordance with the provisions of § 73.53(c)(9).

* * * * *

7. Section 73.317 is amended by revising subparagraph (f)(2) to read as follows:

Section 73.317 *Transmission system requirements.*

* * * * *

(f) * * *

(1) * * *

(2) The station equipment must be operated, tuned, and adjusted so that any emissions outside of the authorized channel do not cause harmful interference to the reception of other radio stations. FM broadcast stations employing transmitters authorized after January 1, 1960, shall maintain the bandwidth occupied by their emissions in accordance with the specifications set forth in paragraph (a) of this Section. Stations using transmitters installed or type accepted prior to January 1, 1960 must achieve the highest degree of compliance practicable with their existing equipment. In either case, should harmful interference to the reception of other radio stations occur, the licensee will be required to take such further steps as may be necessary to eliminate the interference.

* * * * *

8. Section 73.1660 is amended by revising the title and paragraphs (a), (b), (d) and (e), to read as follows:

Section 73.1660 *Acceptability of broadcast transmitters.*

(a) A transmitter may be type accepted or notified upon the request of any manufacturer of transmitters following the procedures described in Part 2 of the FCC's Rules. If acceptable, the transmitter will be included in the FCC's "Radio Equipment List, Equipment Acceptable for Licensing". After March 5, 1984, these transmitters shall be authorized under notification. Transmitters authorized under type acceptance or notification are acceptable for use in this service.

(b) A permittee or licensee planning to install and use as a main transmitter one not included on the FCC's "Radio Equipment List" must obtain authority to use such a transmitter by filing an application for a construction permit on FCC Form 301 (FCC Form 340 for noncommercial educational stations). The application must include a complete description and circuit diagram of the transmitter, description of the carrier frequency determining circuits, complete operating parameters, and measurement data as would be required for a grant of type acceptance.

(c) * * *

(d) AM stereophonic exciter-generators for interfacing with type accepted or notified AM transmitters may be type accepted upon request from any manufacturer by the procedures described in Part 2 of the FCC Rules. AM station licensees will not be authorized to use composite or non-type accepted or non-notified AM stereophonic transmitting equipment under the provisions of Paragraphs (b) and (c) of this Section.

(e) Additional rules covering type acceptance and notification, modification of authorized transmitters, and withdrawal of a grant of authorization are contained in Part 2 of the FCC's Rules.

9. Section 73.1665 is amended by revising paragraph (c) to read as follows:

Section 73.1665 *Main transmitters.*

* * * * *

(c) A licensee may, without further authority or notification to the FCC, replace an existing main transmitter or install additional main transmitter(s) for use with the authorized antenna if the replacement or additional transmitter(s) is type accepted or notified as shown in the FCC's "Radio Equipment List". Within 10 days after commencement of regular use of the replacement or additional transmitter(s), equipment performance measurements, as prescribed for the type of station are to be completed.

10. Section 73.1690 is amended by revising subparagraphs (b)(1), (e)(1), (e)(3), (e)(4) and (e)(6), to read as follows:

Section 73.1690 *Modification of transmission systems.*

* * * * *

(b) * * *

(1) Installation of a main transmitter which is not included on the FCC's "Radio Equipment List" as type accepted or notified for broadcast use.

* * * * *

(e) * * *

(1) Installation of a new transmitter which is included on the FCC's "Radio Equipment List" as type accepted or notified for broadcast use.

(2) * * *

(3) Replacement of the modulator exciter unit of the FM or TV aural transmitter with one that has been authorized for broadcast service through the FCC's type acceptance or notification procedures and that has been demonstrated compatible with the transmitter in use.

(4) Modification of the AM transmitter for stereophonic broadcasting with a stereophonic exciter unit which has been type accepted and designed for interfacing with the type accepted or notified transmitter with which it is to be used.

(5) * * *

(6) Modification of the transmitter for utility load management operations with an exciter unit that has been designed for interfacing with the type accepted or notified transmitter with which it is to be used in accordance with the following:

* * * * *

11. Section 73.3538 is amended by revising subparagraph (a)(3) to read as follows:

Section 73.3538 *Application to make changes in an existing station.*

* * * * *

(a) * * *

(1) * * *

(2) * * *

(3) The installation of a transmitter which has not been authorized by the FCC for use by licensed broadcast stations.

* * * * *

12. The alphabetical index to Part 73 is amended by making the following deletions and additions in alphabetical sequence:

Delete the following:

| | |
|---|---|
| Antenna monitors, Requirements for type approval of (AM) | 73.53 |
| Transmitters, broadcast, Type acceptance of ........................ | 73.1660 |
| Type acceptance of broadcast transmitters ........................ | 73.1660 |
| Type approval of antenna monitors, Requirements for (AM) | 73.53 |

Add the following:

| | |
|---|---|
| Antenna monitors, Requirements for notification (AM) | 73.53 |
| Authorization of broadcast transmitters .............................. | 73.1660 |
| Notification of antenna monitors, Requirements for | 73.53 |
| Transmitters, broadcast, Authorization of ........................... | 73.1660 |

F. Title 47 of the Code of Federal Regulations, Part 74, is amended as follows:

1. The Table of Contents is revised by changing the title of Section 74.550 to "Equipment authorization." and the title of Section 74.655 to "Authorization of equipment."

2. Section 74.550 is amended by revising the title and text to read as follows:

Section 74.550 *Equipment authorization.*

Type acceptance or notification is required by the FCC for all aural broadcast STL and intercity station transmitters employed in the 18 GHz band. Requirements for obtaining an equipment authorization are contained in Subpart J of Part 2 of this Chapter. As of March 5, 1984 all equipment designed exclusively for fixed operation shall be approved under the notification procedure (see Section 2.904(d) of this Chapter).

3. Section 74.655 is amended by revising the title and paragraphs (a) through (g) and by adding a new paragraph (h), to read as follows:

Section 74.655 *Authorization of equipment.*

(a) Type acceptance or notification is not required for transmitters used in conjunction with TV pickup stations operating with a peak output power not greater than 250 mW. Pickup stations operating in excess of 250 mW licensed pursuant to applications accepted for filing prior to October 1, 1980 may continue operation subject to periodic renewal. If operation of such equipment causes harmful interference the FCC may, at its discretion, require the licensee to take such corrective action as is necessary to eliminate the interference.

(b) The licensee of a TV auxiliary station may replace transmitting equipment with type accepted or notified equipment, as detailed under Paragraph (h) of this Section, without prior FCC approval, provided the proposed changes will not depart from any of the terms of the station or system authorization or the Commission's technical rules governing this service, and also provided that any changes made to type accepted or notified transmitting equipment is in compliance with the provisions of Part 2 of the FCC Rules concerning modifications to authorized equipment.

(c) Any manufacturer of a transmitter to be used in this service may apply for type acceptance or notification following the procedures set forth in Part 2 of the FCC Rules.

(d) An applicant for a TV broadcast auxiliary station may also apply for type acceptance or notification, as specified in Paragraph (h) of this Section, for an individual transmitter by following the procedures set forth in Subpart J of Part 2 of the FCC Rules and Regulations. Individual transmitters which are authorized will not normally be included in the FCC's Radio Equipment List.

(e) Type acceptance or notification, as detailed in Paragraph (h) of this Section, by the FCC is required for all transmitters first licensed, or marketed as specified in § 2.803 of the FCC Rules, except as provided for in Paragraph (a) (Refer to Subpart I of Part 2 of the FCC's Rules). This paragraph is effective October 1, 1981.

(f) All transmitters marketed for use under this subpart must be type accepted or notified by the FCC, as detailed in paragraph (h). TV broadcast auxiliary station transmitting equipment authorized to be used pursuant to an application accepted for filing prior to October 1, 1985 may continue to be used by the licensee or its successors or assignees, provided, that if operation of such equipment causes harmful interference due to its failure to comply with the technical standards set forth in this subpart, the FCC may, at its discretion, require the licensee to take such corrective action as is necessary to eliminate the interference. However, such equipment may not be further marketed for reuse under Parts 74 or 78. This paragraph is effective October 1, 1985.

(g) Each instrument of authority which permits operation of a TV broadcast auxiliary station or system using equipment which has not been type accepted or notified will specify the particular transmitting equipment which the licensee is authorized to use.

(h) As of March 5, 1984, transmitters designed to be used exclusively for a television STL station, a television intercity relay station or a television translator relay station shall be authorized under the notification procedure. All other transmitters will be authorized under the type acceptance procedure. Transmitters authorized under type acceptance are acceptable for use in all television broadcast auxiliary stations (see Section 2.904(d) of this Chapter).

4. The alphabetical index to Part 74 is amended by making the following addition in alphabetical sequence:

Notification of equipment:

Aural STL/Relays .......................................... 74.550

TV Auxiliaries .......................................... 74.655

G. Title 47 of the Code of Federal Regulations, Part 78, is amended as follows:

1. Section 78.107 is amended by revising paragraphs (a) and (b) and subparagraph (b)(2), to read as follows:

Section 78.107 *Equipment and installation.*

(a) From time to time the Commission publishes a revised list of type approved, type accepted and certain notified equipment entitled "Radio Equipment List". Copies of this list are available for inspection at the Commission's office in Washington, D.C. and at each of its field offices.

(b) Applications for new cable television relay stations, other than fixed stations, will not be accepted unless the equipment specified therein has been type accepted. In the case of fixed stations, the equipment must be either type accepted or notified for use pursuant to the provisions of this subpart. As of March 5, 1984, transmitters designed to be used exclusively with fixed stations shall be approved under notification (see Section 2.904(d) of this Chapter).

(1) * * *

(2) Neither type acceptance nor notification is required for the following transmitters:

(i) Those which have an output power not greater than 250 mW and which are used in a CARS pickup station operating in the 12.7–13.2 GHz band; and

(ii) Those used under a developmental authorization.

* * * * *

H. Title 47 of the Code of Federal Regulations, Part 94, is amended as follows:

1. The Table of Contents is revised by changing the title of Section 94.81 to "Authorization of microwave equipment."

2. Section 94.81 is amended by revising the title and text to read as follows:

Section 94.81 *Authorization of microwave equipment.*

Except for equipment used under a developmental authorization, all transmitters employed in this service must be either type accepted or notified pursuant to the requirements contained in Subpart J of Part 2 of this Chapter. As of March 5, 1984, all equipment designed exclusively for fixed operation shall be approved under the notification procedure (see Section 2.904(d) of this Chapter).

January 19, 1984

## Dissenting Statement of FCC Commissioner James H. Quello

In re: Amendment of the regulations to expand the notification and verification equipment authorization procedures.

I generally support the majority's move toward use of the notification procedure to reduce the burden of more onerous equipment authorization requirements. Of the kinds of equipment selected in this first attempt to use the notification procedures, an effort has been made to avoid equipment likely to require close scrutiny because of the way it is used and because of the technical sophistication of those likely to be using it. In most instances, the equipment selected is produced in relatively small numbers and, thus, any problems resulting from poorly designed devices could be resolved quickly and with relatively little effort.

My concern is not with notification. It is with verification. And, it is not with interference so much as it is with performance. The Commission has made a commitment to ensure that television receivers meet certain minimum performance criteria, including minimum UHF noise figure performance. We also have a responsibility under the all-channel statute. It is unclear to me how we are to discharge these commitments and responsibilities without any information about who is marketing television receivers and whether those sets make any pretense of complying with the statute and with our policies. Under the verification procedure, no information is to be submitted to the Commission and, of course, no grant of authorization is issued.

Given the Commission's concerns about minimum performance standards for television receivers, I do not believe that the present certification requirement is unduly burdensome. Perhaps notification would enable us to at least keep track of the sets being marketed. But, verification offers no hope of catching any problem before it threatens to overwhelm us.

Therefore, I dissent to that portion of the order which moves television receivers from the certification program to verification.

Issue, Enlargement of, Denied
Reconsideration, Petition for, Denial of

Review Board denied petition to reopen record and enlarge issues filed after Decision's release. Petitioner has not shown that grantee's principal was convicted of activities involving moral turpitude (e.g., fraud); therefore, addition of character issue not justified and contrary to precedent.
*-FBC, Incorporated*
BC Docket 82-106

FCC 83R-104

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

| | |
|---|---|
| FBC, INCORPORATED<br>Lexington, Kentucky | BC Docket No. 82-106<br>File No. BPCT-810529KF |
| WAY OF THE CROSS OUTREACH, INC.<br>Lexington, Kentucky | BC Docket No. 82-108<br>File No. BPCT-810806KK |

For Construction Permit

## MEMORANDUM OPINION AND ORDER

(Adopted: December 28, 1983; Released: January 9, 1984)

BY THE REVIEW BOARD:

1. On October 6, 1983, the Review Board released a Decision, FCC 83R-75, granting the application of FBC, Inc., which was awarded a significant and decisive preference for providing television service to persons who presently receive little or no such service. This preference was found to be more enduring and important than the unsuccessful applicant's substantial preference for participation of ownership in management, paras. 1 and 14. On October 12, 1983, Way of the Cross, the unsuccessful applicant, filed a petition to reopen the record and enlarge the issues based upon allegedly newly discovered evidence. Way's petition will be denied for the reasons set out below.

2. Way's petition to reopen alleges that on August 15, 1983, the Kentucky Real Estate Commission had found that Edgar Wallace,

FBC's proposed Director of Public Affairs, had engaged in "improper and fraudulent conduct" and that it fined Mr. Wallace $500 and revoked his real estate broker's license. According to Way's pleading, the Real Estate Commission's findings were affirmed on October 10, 1983 by the Fayette County Circuit Court, and "Mr. Wallace's conviction for activities involving moral turpitude requires that a character issue be added against FBC. *WNER Radio, Inc.*, 27 FCC 2d 1033, 21 RR 2d 433 (Rev. Bd. 1971)." Pet. 2–3. FBC's failure to notify the Commission concerning these developments, Way contends, also justifies a Section 1.65 failure to report issue and a lack of candor issue. At the time Way filed its petition to reopen, a copy of the opinion and judgment of the Circuit Court was not available. Pet. at note 2.

3. FBC's opposition filed November 10, 1983, furnishes a copy of both the Court's opinion and judgment. Exh. A-1 and A-2. These documents establish that the Court sustained the Real Estate Commission's revocation of license for leasing property without oral or written consent, for failure to remit and account for rents collected, and for expenditures of sums without oral or written permission in violation of local real estate laws and regulations. However, the Court set aside "any suggestion that Wallace's activities were intentional or fraudulent," Judgment, para. 2; Opinion pp. 8–9. It remanded that question and the amount of actual damages for a further hearing.

4. FBC urges that here as in *Boston Broadcasters, Inc.*, 53 FCC 2d 494, 33 RR 2d 1621 (1975), the violations of local law do not warrant reopening the record for inquiry by the F.C.C. because the violations do not involve fraud or misrepresentation. It also maintains that the Kentucky Commission's August 15th finding of fraud, which the Court set aside, was not based on any notice, allegation, or evidence in the proceeding but on a local questionable legal presumption. Mr. Wallace has furnished an affidavit indicating that he did not intend to conceal this matter from the Federal Communications Commission, but was not aware of his duty to report. FBC points out that the matter had been fully reported by the local press and that one of Way's principals was aware of the August 15 decision and chose not to report it until after the Board rendered an unfavorable Decision on October 6.

5. Way's reply filed November 23 continues to insist that the record should be reopened and the issues enlarged; it does not deny that one of its principals was aware of the Kentucky Commission's decision and chose not to report it until our unfavorable Decision. On the contrary, one of its own attachments contains an admission by a principal that "We hadn't told them [the FCC] (about Wallace), but now we are forced to do that." Reply, Att. 2, p. 1.

## DISCUSSION

6. We will not reopen the record at this late stage in the proceeding because, contrary to Way's original allegations, Mr. Wallace has not been convicted of activities involving moral turpitude; in fact the local Court has struck the administrative findings of intentional or fraudulent conduct as not supported by the record. Under these circumstances addition of a character issue has not been justified, and is contrary to Commission precedent. *Boston Broadcasters, Inc., supra*; 47 CFR 1.229(c).

7. The new broadcast application form does require an applicant to report the pendency of a court or administrative proceeding which involves "fraud," FCC Form 301, Section II, para. 4 (Jan. 1982 Ed.). Here, however, the fraud question was not raised until the August 15 Kentucky Commission decision, which was quickly set aside by the Court on appeal on October 10. Mr. Wallace's affidavit indicates that he was not aware of his obligation under Section 1.65 to report the Kentucky Commission's decision by September 15; nor did he intend to conceal this matter, which had received considerable publicity in his community. FBC's tardiness in reporting the Kentucky Commission's action does not justify a Section 1.65 or a lack of candor issue. *See Merrimack Valley Broadcasting, Inc.*, FCC 83–465, released October 13, 1983. Any procedural fault on FBC's part is more than matched by Way's violation of the well-established principle that an applicant like Way cannot "sit back and hope that a decision will go in its favor and then, when it isn't, to parry with an offer of more evidence." *Colorado Radio Corp.* v. *FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

8. Our decision in this case did not rest on Mr. Wallace's proposed participation in the ownership and management of FBC; on the contrary, Way was awarded a substantial preference on the comparative factor of participation of ownership in management, which would not have been increased even if Wallace's participation had been totally discounted. On the other hand, FBC's decisive preference was based on its superior engineering coverage to people who receive little or no service. Accordingly, the allegations against Wallace do not change the "core circumstance" or "the decisional premises" on which our decision was based, and a remand is not required by past precedent. See para. 30, *Peoples Broadcasting Co.*, 52 RR 2d 1617, *recon. denied* 53 RR 2d 1210 (Rev. Bd. 1983); *rev. denied* FCC 83–594, December 15, 1983; *Greater Boston Television Corp.* v. *FCC*, 463 F.2d 268, 285 (D.C. Cir. 1971).

9. Finally, assuming *arguendo* that as a result of the remanded state proceedings evidence should emerge that might reflect adversely on Mr. Wallace's participation in FBC's broadcast operation, the Commission at that point would have the power to condition a final grant of license upon his separation from the affairs of FBC pending

a determination of his status. Compare *Greater Boston Television Corp.* v. *FCC, supra,* 463 F.2d at 287. On the record presently before us, such a condition is not appropriate, nor is a reopening of the record for a further evidentiary hearing.

10. ACCORDINGLY, IT IS ORDERED, That the petitions for leave to amend filed October 27, November 9, and December 7, 1983 by FBC, Incorporated, and November 15, 1983 by Way of the Cross Outreach, Inc. ARE GRANTED and the amendments ARE ACCEPTED; and

11. IT IS FURTHER ORDERED, That the petition to reopen the record and to enlarge the issues based on newly discovered evidence filed October 12, 1983, by Way of the Cross Outreach, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

**Cellular Communications Systems**
**Domestic Public Land Mobile Radio Service**
**Interlocutory Ruling Appeal From**
**Mobile Radio Service, Cellular**
**Settlement**

**Cellular applicants proposing partial settlement during comparative procedure appealed ALJ's denial of same. Commission reversed ALJ on grounds of policy, incorrect reading of precedent, and fairness. Commission encouraged settlement, in ALJ's discretion, throughout procedure, at least until release of I.D.**
**–*Florida Telephone Co.***
**CC Docket 83–661**

**FCC 84–42**

**BEFORE THE**

## FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

| | |
|---|---|
| **In re Applications of** | **CC Docket No. 83–661** |
| **FLORIDA TELEPHONE COMPANY** | **File No. 26100-CL-P-6–82** |
| **CELL-TEL NETWORK** | **File No. 26059-CL-P-11–82** |
| **BAYFONE OF MIAMI** | **File No. 26138-CL-P-8–82** |
| **CELLULAR MOBILE SYSTEMS OF FLORIDA, INC.** | **File No. 26170-CL-P-19–82** |
| **FLORIDA CELLULAR TELEPHONE COMPANY** | **File No. 26141-CL-P-16–82** |
| **MCI CELLULAR TELEPHONE COMPANY** | **File No. 26094-CL-P-9–82** |
| **MRTS-POE OF MIAMI** | **File No. 26081-CL-P-6–82** |
| **For a construction permit to establish a cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Miami/Fort Lauderdale, Florida modified Standard Metropolitan Statistical Area** | |

## MEMORANDUM OPINION AND ORDER

(Adopted February 7, 1984; Released February 10, 1984)

BY THE COMMISSION:

1. Cell-Tel Network (CTN) and Florida Telephone Company (FTC), applicants for cellular service in the Miami, Florida SMSA, move jointly for leave to file an interlocutory appeal following the denial of their Joint Motion for Approval of Settlement; they also ask expedited relief, and a stay of procedural dates pending resolution of this appeal. Cell-Tel Network (the entity resulting from the settlement arrangement between CTN and FTC) submits an appeal of interlocutory ruling. Responsive pleadings have been filed.

2. On July 1, 1983, CTN and FTC, along with eight other applicants, were designated for a comparative hearing to determine which of them should be awarded a construction permit to provide cellular service to the Miami/Fort Lauderdale SMSA.[1] In the course of the comparative proceedings, several applicants arranged partial settlements, reducing the number of pending applicants to seven. The hearing procedure was concluded, and the record was closed on December 5, 1983. On December 23, CTN and FTC filed both a Notice of Settlement, informing the Administrative Law Judge of their intention to merge, and a Request for Suspension of Procedural Dates to allow them time to effect their settlement. This request was granted by the ALJ, *Memorandum Opinion and Order*, FCC 83M-4870, released December 28, 1983, and new filing deadlines were established.[2] CTN and FTC proceeded with their settlement arrangements, notifying the ALJ on January 9, 1984 of their choice of Cell-Tel Network as the surviving applicant, and filing their settlement agreement on January 23, 1984. By *Memorandum Opinion and Order* of January 26, 1984, FCC 84M-426, the ALJ denied their Joint Motion for Approval of Settlement. It is against this denial that the present appeal is lodged.[3]

3. Applicants argue that the ALJ's order denying settlement is contrary to Commission precedent and policy, and that equitable considerations mandate consideration and grant of the partial settlement. They state that the ALJ improperly relies exclusively

---

[1] Advanced Mobile Phone Service, Inc. (Miami Order), Mimeo 5061, released July 1, 1983.

[2] The ALJ established January 9, 1984 as the date by which CTN and FTC must indicate which of their applications was to survive, January 23 for the filing of the settlement agreement, February 7 for all parties to file proposed findings of fact and conclusions of law, and February 22 for all parties to file reply findings of fact and conclusions of law.

[3] The ALJ denied petitioners' motion for leave to appeal, FCC 84M-608, released February 3, 1984. Petitioners' appeal here, however, is a matter of right, because the new entity resulting from the settlement agreement is a party whose right to participate has been terminated by the Judge's interlocutory order. *See* Section 1.301(a)(1).

upon the Common Carrier Bureau's order in the Philadelphia cellular proceedings, *Celcom Communications Corporation of Pennsylvania*, CC Mimeo 486, released October 28, 1983 (*Celcom Order*). Applicants state that the *Celcom Order* is distinguishable because in Philadelphia the applicants submitted their settlement agreement *after* the Initial Decision had been rendered. Furthermore, according to the applicants, the procedural schedule in this proceeding had already been altered by the December 28 order to allow the settlement agreement to be filed on January 23, 1984. Applicants state that for the judge to accept their Notice of Settlement and alter the filing schedule to accommodate the settlement, then to reverse himself and deny their settlement when filed is unfair.[4] The applicants further argue that in this case, unlike the Philadelphia case, the acceptance of the settlement agreement would tend to avoid delay rather than to cause it. We agree.

4. The ALJ makes clear in his order denying settlement that he does rely exclusively on the *Celcom Order*, and that he interprets that order as an absolute bar on settlement agreements submitted after the close of the hearing record. The issue before the Bureau in *Celcom* was whether to approve a settlement proposal submitted after the ALJ had issued an Initial Decision; the Bureau's decision that such approval should be withheld is the subject of a pending Commission review. Without reaching that issue, we hold today that we intend to impose no limit upon an ALJ's discretion to consider a settlement proposal submitted at any time prior to the issuance of an initial decision. We recognize that when, as in this case, that proposal is presented after the close of the record, the ALJ must determine whether the benefits to be derived from accepting the proposal are justified under the circumstances. We have encouraged settlements as a means of expediting service to the public by reducing the number of applicants and issues to be considered in comparative proceedings. At a late stage of the proceeding, however, the delay involved, the duplication of effort, and the possibility of prejudice to other parties must be taken into consideration.[5] This determination is within the discretion of the ALJ. The case before us, where a settlement proposal was submitted within the time schedule set by the ALJ, after the close of the hearing record but before the submission of proposed findings of fact and conclusions of law, is not analogous to the *Celcom* case, and the *Celcom Order* is not dispositive here. Because CTN and FTC filed their settlement within the timeframe set by the order of December 28, 1983, the ALJ should have accepted the settlement proposal for filing.[6]

---

[4] ALJ Walter C. Miller is presiding over the Miami comparative procedure. In his absence, then-Chief ALJ Lenore Ehrig issued the December 28 order accepting the Notice of Settlement and setting new filing dates.

[5] American Radio-Telephone Service, Inc., FCC 83–179, released May 9, 1983.

5. Accordingly, IT IS ORDERED that the Appeal of Cell-Tel Network IS GRANTED and that the Administrative Law Judge shall reconsider the Joint Motion for Approval of Settlement and shall accept the settlement agreement for filing.

6. IT IS FURTHER ORDERED that the ALJ shall entertain requests for extension of time consistent with this Order.

7. IT IS FURTHER ORDERED that this Order is effective upon its adoption.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

---

[6] Although we have stated that the *Celcom Order* does not require the dismissal of the settlement agreement here as a procedural matter, the proposal is still subject to the ALJ's determination as to whether it complies with our rules regarding settlement agreements in the cellular service.

**Diversification, of Control of Mass Media, Ownership and Management, Integration of Ownership Multiple, Factor in Applications.**

**Slight diversification preference given to applicant with distant CATV interests over applicant which controls two distant TV permittees. No parttime integration credit awarded to applicant whose principal would not be at station on regular basis. No credit under best practicable service objective allowed for two limited partners who would work at station in managerial positions.**

**–*Greater Wichita Telecasting, Inc.***

**BC Docket 81–103**

FCC 84–72

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of<br>GREATER WICHITA TELECASTING, INC.<br>Wichita, Kansas | BC Docket No. 81–103<br>File No. BPCT-800806KG |
| COLUMBIA-KANSAS TV, LTD.<br>Limited Partnership<br>Wichita, Kansas | BC Docket No. 81–104<br>File No. BPCT-800314KE |
| For Construction Permit | |

*Appearances*

*Grover C. Cooper*, *Richard L. Bodorff* and *David D. Oxenford*, on behalf of Greater Wichita Telecasting, Inc.; *Arthur Scheiner* and *Barry A. Friedman*, on behalf of Columbia-Kansas TV, Ltd.; and *Brian P. Kilbane*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

## DECISIONS

(Adopted: March 1, 1984; Released: March 15, 1984)

BY THE COMMISSION: Commissioner Rivera concurring and issuing a statement.

1. The Commission has before it the following pleadings: (a) Protective Application for Review of Action Taken Pursuant to

Delegated Authority filed August 30, 1982, by Columbia-Kansas TV, Ltd. (Columbia);[1] (b) Contingent Petition to Reopen the Record and/or Remand the Proceedings, filed December 14, 1982, by Columbia;[2] (c) Application for Review of the Review Board's Decision[3] filed January 13, 1983, by Greater Wichita Telecasting, Inc. (Greater Wichita);[4] (d) Motion to Enlarge Issues filed February 22, 1983, by Greater Wichita;[5] (e) Supplement to Application for Review and Contingent Motion for Remand to Consider Newly Discovered Evidence filed March 1, 1983, by Greater Wichita; (f) Motion to Strike filed March 8, 1983, by Columbia;[6] and (g) Second Supplement to Application for Review and Request for Remand filed April 12, 1983, by Greater Wichita Telecasting, Inc.[7]

2. Our *Policy Statement on Comparative Broadcast Hearings (1965 Policy Statement)*,[8] states that there are two primary objectives toward which the comparative process should be directed: the best practicable service to the public and a maximum diffusion of control of mass communications media. The Presiding Judge, Thomas B. Fitzpatrick, found the two applicants for television Channel 24 in this comparative proceeding equal under the best practicable service criterion and awarded a construction permit to Greater Wichita based upon a slight diversification perference. The Review Board found the media interests of the applicants "cross-cancelling" under the diversification objective, but declared Columbia the winner under the best practicable service objective. Since the Review Board released its Decision in this proceeding, Greater Wichita's four principals have obtained ownership of 70 percent of a new television permittee in Dayton, Ohio,[9] which has significantly increased Greater Wichita's broadcast interests that must be considered under our diversification objective.[10] We have determined that Columbia

---

[1] Columbia filed a Supplement to (a) on January 13, 1983. Greater Wichita Telecasting, Inc. (Greater Wichita) submitted an Opposition to (a) on January 28, 1983.

[2] On December 23, 1982, Greater Wichita filed an Opposition to (b). Columbia filed a Reply to that Opposition on January 4, 1983.

[3] *Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046 (1982), *reconsideration denied*, 92 FCC 2d 780 (1982).

[4] Columbia filed an Opposition to (c) on January 28, 1983. Counsel for Greater Wichita filed a letter with the Commission concerning statements made in the foregoing Opposition on February 7, 1983.

[5] Columbia filed an Opposition to (d) on March 8, 1983, to which Greater Wichita filed a Reply on March 17, 1983.

[6] Greater Wichita filed an Opposition to (f) on March 8, 1983.

[7] Columbia filed an Opposition to (g) on April 19, 1983.

[8] 1 FCC 2d 393 (1965).

[9] The Greater Wichita principals own 70 percent of Dayton Telecasting, Inc., whose application for a new UHF television station at Dayton, Ohio, was granted by the Review Board as the result of a settlement among the relevant applicants. *Dayton Telecasting, Inc.*, FCC 83R-97, released December 1, 1983.

[10] We shall deny Columbia's Contingent Petition to Reopen the Record and/or

prevails in the comparative evaluation. Except as modified or clarified by this Decision, we hereby adopt the Review Board's findings of fact and conclusions of law.

### *Diversification*

3. The four persons who are the officers, directors, and stockholders of Greater Wichita own 100 percent of a UHF television permittee in Charleston, West Virginia, 70 percent of a UHF television permittee in Dayton, Ohio, and an option to purchase 12.5 percent of television permittee in Portland, Maine. Columbia is a limited partnership consisting of one general partner, CCI Kansas, Inc., which has an 80 percent interest in the partnership, and sixteen limited partners. Ninety-five percent of the general partner is owned by Columbia Communities, Inc., which is in turn owned by Richard A. Rudy (40 percent), Harold S. Goldstein (40 percent) and Louis Freedman (20 percent).[11] Messrs. Rudy and Goldstein together control companies holding franchises for CATV systems covering portions of Houston and Harris County, Texas. Columbia's general partner is the parent of a company with a 50 percent interest in CATV systems in Harris County, Galena Park, Jacinto City, and Rosenberg, Texas.[12] These systems are located in the vicinity of Houston, which is about 600 air miles from Wichita. Finally, Mr. Lee Hanna, a 5 percent owner of Columbia's general partner, CCI Kansas, Inc., is a limited partner of a new UHF television permittee in Davenport, Iowa.

4. As for local interests, William C. Cohen, Jr., a 1 percent limited partner in Columbia, is co-trustee of a trust which holds a 4.8 percent interest in Misco Industries, Inc., which in turn owns 85 percent of Misco Broadcasting Corporation, the licensee of AM station KAKZ in Wichita.[13] Jo S. Zakas, a 1.6 percent limited partner in Columbia, is Secretary, Director and 4.5 percent owner of

---

Remand the proceedings filed on December 14, 1982. Columbia asserts that if the Commission grants review of the Board's Decision herein, this proceeding should be remanded or reopened to consider fully the fact that Greater Wichita acquired an option to purchase up to 12.5 percent of a television permittee at any time during the next five years, as the result of a settlement of a Portland, Maine, comparative television proceeding. *See* FCC 82M-3537, released November 9, 1982. (BC Docket Nos. 81-116 and 81-117). Greater Wichita's potential future interest in the Portland station is already a matter of record, this fact is being given full consideration in our diversification analysis, and thus no purpose would be served by a remand of this proceeding to consider that interest.

[11] Columbia Exhibit (Ex.) 1.

[12] Columbia Ex. 2; Joint Ex. 1.

[13] Columbia Ex. 2, p.3. The media interests of limited partners have been considered under our diversification analysis as being less significant than interests held by owners with voting rights, just as the media interests of nonvoting preferred stockholders in Channel 19, Inc. were considered in *Cleveland Television Corporation*, 91 FCC 2d 1129, 1139 (Rev. Bd. 1982); *review denied*, FCC 83-235, released May 18, 1983.

The Wichita Publishing Co., which publishes a local monthly magazine entitled "The Wichitan."[14] Columbia plans to utilize Ms. Zakas as Assistant General Manager of its proposed television in Wichita. Ms. Zakas will be responsible for general administrative activities and supervision of the station's community relations and public affairs activities.[15]

5. In our *1965 Policy Statement*, we stated that, under the diversification of control of mass communications media objective, we would consider common control and less than controlling interests in other broadcast stations and other mass communications media. We also explained that media interests in the principal community proposed to be served would normally be of most significance, followed by interests in the proposed service area and finally, by interests in the nation generally. Further, we explicitly stated that significant managerial positions and less than controlling ownership interests in mass media would be considered in our diversification analysis when held by persons having ownership or significant managerial positions in an applicant.[16] We also explained that we would consider interests in existing mass media to be more significant to the degree that they "(a) are larger, *i.e.*, go towards complete ownership and control."[17] Applying the foregoing principles to the facts in the case now before us, it is clear that Columbia deserves a slight preference over Greater Wichita under the diversification objective.

6. The applicants' media interest in Wichita, Kansas, which has the most significance is that of Ms. Zakas, a 1.6 percent limited partner of Columbia, who will have a managerial position with Columbia's proposed station and currently owns 4.5 percent of "The Wichitan." Ms. Zakas' ownership interests in the applicant and the monthly publication are so small that a grant of Columbia's application would not adversely affect the local diversification of mass media. Since Wichita, Kansas, is served by numerous other mass media, including 3 commercial television stations, 1 educational television station, 6 commercial AM radio stations, 5 commercial FM stations, 2 educational FM stations and a daily newspaper with a circulation of 126,544, Ms. Zakas' modest interests and managerial position at the station are of extremely minor significance.[18]

7. In terms of distant mass media, however, Greater Wichita's four principals own 100 percent of a UHF television permittee in Charleston, West Virginia, 70 percent of another UHF television

---

[14] *See* Transcript (Tr.) 99–102, 106; Joint Exhibit 4.

[15] Columbia Ex. 6, p.1.

[16] 1 FCC 2d 393, 394, n.5.

[17] 1 FCC 2d 393, 395.

[18] *See* Jt. Ex. 4.

permittee in Dayton, Ohio, and an option to purchase 12.5 percent of a third television permittee in Portland, Maine.[19] Although one of Columbia's principals, Mr. Lee Hanna, has a limited partnership interest in a Davenport, Iowa, television permittee, Columbia's main interests are in cable television systems, which primarily retransmit signals of broadcast stations. Cable television is considered to be a "media voice" for diversification purposes in part because cable franchisees have the ability to choose whether or not they carry certain programming.[20] CATV interests have traditionally been less important for diversification purposes than broadcast interests, since broadcast stations provide unique local and informational programming to their communities of license and adjacent areas. Thus, we conclude that Greater Wichita's majority ownership and control of two distant television permittees is more significant under our diversification criterion than Columbia's limited media interests in Wichita and its distant CATV interests. Therefore, we award Columbia a slight diversification preference.

### *Best Practicable Service*

8. The Review Board overturned the Presiding Judge's determination that neither applicant was due a preference under the best practicable service objective. First, the Board awarded a "slight salutary merit" for participation in the management of Columbia's proposed station by Ms. Zakas and Mr. Casado. Both of these individuals are limited partners who have participated in local civic activities.[21] Mr. Casado is a .4 percent owner while Ms. Zakas owns 1.6 percent of Columbia. As stated previously, Ms. Zakas will work fulltime as Assistant Manager of the station. Mr. Casada plans to work 20 hours per week for the station as Director of Community Relations. In awarding Columbia a slight merit, the Board recognized that our ruling in *Anax Broadcasting Co., Inc.* (Anax)[22] held that we do not consider interests of limited partners as relevant in determining credit under the integration of management and ownership criterion. Nevertheless, the Board concluded that the equity ownership and significant management positions of these two

---

[19] Although the Board noted that Mr. Lee Hanna, who owns 5 percent of Columbia's general partner, is a principal in an entity which holds a similar option to purchase an interest in a Des Moines, Iowa, television station (90 FCC 2d 1046, 1050), Columbia has explained that the relevant option is contingent upon the permittee's failure to obtain an order for its antenna and transmitter within a specified time period and that the permittee has already placed its order and is preparing to begin broadcast operations. *See* page 4 of Columbia's Reply to Greater Wichita's Opposition to Columbia's Contingent Petition to Reopen the Record and/or Remand the proceedings filed January 4, 1983.

[20] *See Allied Broadcasting, Inc.* v. *FCC*, 435 F.2d 68, 72 (D.C. Cir. 1970) and cases cited therein.

[21] Initial Decision, Findings, paras. 48–50, 54 and 56.

[22] 87 FCC 2d 483, 488 (1981).

individuals at Columbia's proposed station deserved some type of recognition since they are local owners and our *1965 Policy Statement* allows some credit to be given for local ownership even if it is not integrated into management.[23]

9. We shall not give Columbia any credit or merit for the participation of Ms. Zakas and Mr. Casado in the management of Columbia's proposed station. The purpose behind our award of integration credit is to strengthen the bond between legal responsibility and day-to-day management authority. Since limited partners are "passive investors and have no authority to control the licensee, their integration or lack of integration is inconsequential."[24] In this regard, Columbia's limited partnership agreement makes clear that the limited partners do not have any authority to participate in the management and control of the business; all such powers are reserved for the general partner.[25] Thus, the fact that certain management-level employees of Columbia's proposed station would also be limited partners does not merit recognition under our integration criterion or under the more general objective of providing the best practicable service to the public.

10. The Board also awarded a slight integration credit to Columbia because of the participation of Mr. Lee Hanna. Mr. Hanna is the executive vice-president, chief operating officer and 5% shareholder of Columbia's General Partner, CCI Kansas, Inc. He states that he will devote 20 hours each week to reviewing the performance of the station's general manager and to ensuring that the programming (including news) and operating practices of the station are carried out in a manner that accords with the policies and goals of the licensee.[26] He does not propose to be involved in day-to-day decision making. He testified that he does not plan to spend all of the 20 hours a week at the station in Wichita, unless circumstances require him to do so. Rather, he anticipates that his duties might often require him to be in New York, Chicago, or Los Angeles in conjunction with programming and sales matters.[27] During some weeks, he foresaw spending no time at all in Wichita.[28] Proposing to spend a day or two each week at home with his wife,[29]

---

[23] 1 FCC 2d 393, 395–96.

[24] *Anax, supra*, 87 FCC 21 483, 488 (1981). See also *Absolutely Great Radio, Inc.*, FCC 83–464, adopted October 6, 1983, where we noted that, in contrast to the concern under the diversification criterion about the possible adverse consequences of ownership interests held by limited partners and preferred stockholders, no credit is given for integration absent actual participation by a person with legal responsibility for the applicant.

[25] Greater Wichita Ex. 2, pp. 3–7.

[26] Columbia Ex. 6, p.1; Tr. 66.

[27] Tr. 64–66.

[28] Tr. 67.

[29] Tr. 63.

Mr. Hanna indicated that he has no plans to move his permanent residence from New York City, where he has lived for about forty years.[30] Mr. Hanna also testified that his principal occupation involves working about 70 hours per week as President of Intrecom, Inc., a New York-based television consulting firm which constitutes his largest single asset and in which he has a 65 percent interest.[31] In view of all of these existing commitments, it is clear that Hanna's involvement with Columbia's proposed station is not the local, fulltime kind of integration our *1965 Policy Statement* was attempting to encourage. Hanna's management duties are not significantly different from those of many absentee owners, *i.e.*, owners who do not live in the service area of a broadcast station they own. Therefore, since Hanna's commitment to be physically present in Wichita is too vague to be credited, Columbia is not due any integration credit for his involvement in the operation of Columbia's proposed station.[32]

### *Additional Matters*

11. In its Motion to Enlarge Issues filed February 22, 1983, and its Supplement to Application for Review and Contingent Motion for Remand to Consider Newly Discovered Evidence filed March 1, 1983, Greater Wichita requests that we remand this proceeding to determine whether Columbia violated Section 1.65 of our Rules by failing to report Mr. Hanna's commitment to devote 20 hours per week to a proposed television station in Madison, Wisconsin, performing duties similar to those proposed for Mr. Hanna with respect to the Wichita, Kansas, station.[33] Mr. Hanna was the majority stockholder and chief executive officer of the general partner of tvUSA/Madison, Ltd., which was an applicant for a new UHF television station in Madison, Wisconsin. TvUSA/Madison,

---

[30] Tr. 54–55.

[31] Tr. 55–57 Columbia Ex. 3, p.2. Although Mr. Hanna suggested that his brother, who owns 35% of Intrecom, could take over basic responsibility for Intrecom, this idea was offered as a mere possibility and not an actual proposal warranting serious consideration.

[32] *Compare Snake River Valley Television, Inc.*, 26 FCC 2d 380, 387 (Rev. Bd. 1970); *review denied*, FCC 71–549, released May 26, 1971. In *Snake River*, Idaho Television Corp. (Idaho) received credit for the parttime integration of James Lavenstein, who had similar duties to Mr. Hanna's proposed duties in this case. Idaho proposed to utilize Mr. Lavenstein at its proposed station for three days each week during the first year of operation and two days per week thereafter. The Board's Decision accepted Idaho's assertion that Mr. Lavenstein would be physically present at Idaho's station for the specified number of days per week. Although Mr. Hanna testified that he expected to be in Wichita for two days a week on the average (Tr. 63–67), he has not committed himself to be present in Wichita for any specific period.

[33] On March 8, 1983, Columbia filed a Motion to Strike, as unauthorized, the foregoing pleadings and a letter from Greater Wichita's counsel to the Commission dated February 7, 1983. We shall deny Columbia's Motion to Strike.

Ltd. and other mutually exclusive applicants for the same television channel in Madison, Wisconsin, have entered into a settlement agreement pursuant to which Mr. Hanna will have no ownership or managerial interest in the permittee for that channel.[34] Thus, at this point, Mr. Hanna's commitment to devote 20 hours per week to the proposed television station in Madison is moot. After the Initial Decision in this proceeding was released and before the Review Board issued its Decision, Columbia reported in this proceeding that Mr. Hanna was no longer committed to devote 20 hours per week to a proposed Des Moines, Iowa, television station performing the same duties as were proposed for the Wichita, Kansas, station.[35] Nevertheless, Columbia failed to report in this proceeding that Mr. Hanna had proposed to devote 20 hours per week to the Madison, Wisconsin, station performing the same duties as were proposed in the Des Moines and Wichita stations.

12. Thus, at the time that this proceeding was on appeal to the Review Board (*i.e.*, from March through December 1982), the record did not reveal Mr. Hanna's commitment to the proposed Madison, Wisconsin station, but did explain that Mr. Hanna no longer had any commitments to a proposed Des Moines, Iowa station. By failing to report Hanna's commitment to the Madison applicant, Columbia violated Section 1.65 of our Rules which requires all applicants to report matters of possible decisional significance to us within 30 days of their occurrence.

13. We find, however, that Columbia's violation of Section 1.65 does not warrant the addition of an issue and a remand for further hearing. While the information was not filed in conjunction with the Wichita application, as it should have been, it was fully revealed in the Madison application. Clearly Columbia was not intentionally withholding information from the Commission in an attempt to improve its comparative posture in the Wichita proceeding. The adversarial nature of the comparative hearing process substantially lessens the possibility that Columbia failed to amend its application in the hope that Hanna's Madison connection would not surface in the Wichita proceeding. Columbia's single, unintentional failure to report a 20 hour commitment by Hanna does not amount to the type of conduct which would reflect so adversely on its qualifications as to affect the outcome of this proceeding.[36] Under these circumstances, a remand would serve no useful purpose and would result in an

---

[34] *See* Columbia's amendments to its application filed June 3, 1983, and August 12, 1983.

[35] *See* the Board's Decision, 90 FCC 2d 1046, 1050, n.4.

[36] *See Merrimack Valley Broadcasting, Inc.* FCC 83-465, released October 13, 1983. Hanna's 20 hour commitment in the Madison proceeding is not necessarily inconsistent with his expressed intent to devote 20 hours to the Wichita station. It serves, however, to buttress our prior conclusion that Hanna's intentions concerning the Wichita proposal are too vague to be given integration credit.

unnecessary delay in the initiation of a new television service in Wichita.

14. In its Second Supplement to Application for Review and Request for Remand filed April 12, 1983, Greater Wichita requests that we remand this proceeding to determine whether two Columbia principals, Messrs. Rudy and Goldstein,[37] engaged in behavior which resulted in a horizontal territorial market division of the city of Houston, Texas for cable television franchises, in violation of Section 1 of the Sherman Act. This request is based upon the opinion rendered by the United States Court of Appeals for the Fifth Circuit in *Affiliated Capital Corporation* v. *City of Houston, (City of Houston)*, No. 81-2335 (5th Cir., decided March 17, 1983). *City of Houston* involved an appeal by a losing applicant for a cable television franchise in Houston on the grounds that the Mayor and City Council as well as other applicants had conspired to allocate the CATV franchises in an anti-competitive manner. In brief, the Mayor and City Council of Houston approved applications for CATV franchises by five applicants, who, at the city's request, agreed among themselves that each would apply for certain non-overlapping CATV franchises in Houston. One of the applicants which received a franchise was Westland CATV, Ltd., a company controlled through another entity by Messrs. Rudy and Goldstein.[38] Affiliated Capital Corp., the plaintiff in the case, never entered into an agreement with the other CATV applicants, although it had been advised by the City Council to attempt to strike a deal with the other applicants. The Court of Appeals found that the applicants, the Mayor, and the City Council of Houston were involved in a territorial market division of the city of Houston for cable television franchises which constituted a *per se* violation of the Sherman Act.

15. We shall deny Greater Wichita's request for remand. Columbia was not a party to the *City of Houston* case and did not participate in that civil litigation. Those applicants which received CATV franchises in Houston, including the applicant controlled by Columbia principals, were attempting to comply with the procedures established by the city of Houston when they drew the boundaries of their respective proposed franchises and filed for non-overlapping franchises. No showing has been presented indicating that Columbia's principals have a propensity to violate the antitrust laws or any other laws or that those principals would not be reliable broadcast licensees. In this light, a remand as requested by Greater Wichita

---

[37] As explained in paragraph 3, *supra*, Rudy and Goldstein own 80 percent of the stock of the corporation which owns 95 percent of Columbia's general partner.

[38] Rudy and Goldstein each own 33⅓ percent of Columbia Communications Corp.—Westland, while Marvin Katz, personal attorney to Houston Mayor James McConn, owns the remaining 33⅓ percent of that company. Columbia Communications Corp.—Westland is the general partner and holds a 54 percent equity interest in Westland CATV, Ltd.

would not be useful or productive in evaluating Columbia's qualifications to be a broadcast licensee.

### *Summation*

16. In conclusion, we note that this is a relatively close case. Although neither applicant is due a preference under the best practicable service objective, Columbia deserves a slight, but on the facts of this case, determinative preference under the diversification of mass media objective primarily because Greater Wichita's principals already have majority ownership and control of two television permittees. Therefore, Columbia's application shall be preferred.

17. ACCORDINGLY, IT IS ORDERED, That:

(a) the Protective Application for Review of Action Taken Pursuant to Delegated Authority, filed August 30, 1982, by Columbia-Kansas TV, Ltd., and the Supplement thereto filed January 13, 1983, the Contingent Petition to Reopen the Record and/or Remand the Proceedings filed December 14, 1982, by Columbia-Kansas TV, Ltd. and the Motion to Strike filed March 8, 1983, by Columbia-Kansas TV, Ltd. ARE DENIED;

(b) the Application for Review of the Review Board's Decision[39] filed January 13, 1983 by Greater Wichita Telecasting, Inc., the Motion to Enlarge Issues filed February 22, 1983, by Greater Wichita Telecasting, Inc, and the Supplement to Application for Review and Contingent Motion for Remand to Consider Newly Discovered Evidence filed March 1, 1983, by Greater Wichita Telecasting, Inc. ARE GRANTED to the extent indicated in this Decision and ARE DENIED in all other respects, and the Review Board's Decision, *supra*, IS MODIFIED as reflected herein; and

(c) the Second Supplement to Application for Review and Request for Remand filed April 12, 1983, by Greater Wichita Telecasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

---

[39] *Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046 (1982), *reconsideration denied*, 92 FCC 2d 780 (1982).

## CONCURRING STATEMENT
## OF
## COMMISSIONER HENRY M. RIVERA

**RE: Wichita, Kansas Comparative Television Proceeding**

**This case illustrates the artificiality of distinctions that can be drawn in comparative licensing cases. The applicants here are virtually in a dead heat. The Commission selects Columbia-Kansas TV. Ltd. over Greater Wichita Telecasting, Inc., because the former's cable television interests are somehow less material that the latter's broadcast interests under the diversification criterion. This is a questionable distinction. Indeed, it is one which finds little, if any, case law support. However, lacking any other basis on which to choose between the applicants, I perforce concur in the result.**

Site Availability

Review Board directed applicant to file amendment specifying new transmitter site, where motion to enlarge issues shows that new owner of present site does not intend to make it available and applicant's only recourse is a lawsuit to enforce lease option on the site.

*-Kaldor Communications, Inc.*

BC Docket 82-118

FCC 84R-7

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of<br>KALDOR COMMUNICATIONS, INC.<br>Manhattan, Kansas | BC Docket No. 82-118<br>File No. BPH-810420AC |
| OGDEN BROADCASTING SERVICE, INC.<br>Ogden, Kansas | BC Docket No. 82-120<br>File No. BPH-810427AK |
| For Construction Permit for a New FM Station | |

## MEMORANDUM OPINION AND ORDER

(Adopted: January 27, 1984; Released: February 3, 1984.)

BY THE REVIEW BOARD: Board Member Blumenthal absent.

1. This proceeding involves the mutually exclusive applications of Kaldor Communications, Inc. (Kaldor) and Ogden Broadcasting Service, Inc. (Ogden) for authority to construct a new FM broadcast station at Manhattan or Ogden, Kansas, respectively. A trial type hearing was held and, in an Initial Decision, FCC 83D-36, released June 29, 1983, presiding Administrative Law Judge Byron E. Harrison granted Ogden's application. Exceptions were filed by Kaldor, to which Ogden replied, and oral argument before the Review Board took place on December 9, 1983.

2. At oral argument, the parties also addressed a motion to enlarge issues filed by Kaldor on August 29, 1983, and Ogden's opposition thereto. In the motion, Kaldor alleges that Ogden no longer has reasonable assurance of the availability of its proposed

transmitter site because the new owner of the site (Ogden has only a lease option) plans to build residential housing on it and has already had the site rezoned in a manner which prohibits radio tower construction. It therefore requests that the proceeding be remanded on a site availability issue to explore the effect of this situation on Ogden's grant. Ogden opposes remand, arguing that it has a legally enforceable right to the site against its new owner (via the lease option) and, thus, retains reasonable assurance of the site's availability. In the alternative, Ogden asserts that on September 29, 1983 it obtained a separate lease option for the same transmitter site proposed by Kaldor and would be willing to specify that site as its own (along with the same facilities that Kaldor has specified and a new financial plan to cover construction of such facilities) if the Board concludes that Ogden has lost reasonable assurance of the present site's availability.

3. It is well established that reasonable assurance of site availability does not require a legally binding arrangement or legal control of the land. *E. g., Louis Vander Plate*, 13 FCC 2d 952, 957, 13 RR 2d 1040, 1047 (1968). Even an oral promise by the landowner to sell or lease property is sufficient. *Id.* Thus, a site issue focuses on the reasonableness of an applicant's assurance and on the availability, in practical terms, of the proposed site. Consequently, it has been held that advance zoning approval for a site is not required, even if present zoning is adverse, so long as there is no evidence that approval is unlikely. *Chronicle Publishing Co.*, 3 RR 2d 531 (Rev. Bd. 1964). In the instant case, Kaldor does not challenge the legality of Ogden's lease option document but presents the affidavit of the property's new owner, Mr. Dennis K. Kuhlman, who avers that while he is aware of the existence of the lease option he nevertheless anticipates building a home on said lot "in the near future," has begun grading for a road there, and would oppose construction of a radio tower anywhere on the property. Kaldor petition, Exh. A, pp. 1, 2. Under these circumstances, the legal opinion of local Kansas counsel, supplied by Ogden, that Ogden could secure specific performance of the lease arrangement in the Kansas courts is unavailing, because it does nothing to gainsay the apparent fact that the site in question is presently unavailable to Ogden and that Mr. Kuhlman has no intention of (voluntarily) making it available.

4. We distinguish the Ogden type of disharmony between owner and would-be lessee from zoning situations, such as *Chronicle Publishing Co., supra*, where buyer and seller are in present agreement and the only question is whether a third party (the zoning authority) will vitiate the agreement in the future. Here, instead, owner and lessee are clearly at odds at present, making immaterial the possibility that a lawsuit will bring them together in the future.[1]

---

[1] We note that, as of the December 9, 1983 oral argument herein, Ogden had neither

Ogden's site does not appear to be presently available to Ogden and, but for Ogden's proffered alternative lease option, the Board would be obliged to add the requested issue. *See Valley FM Radio*, 53 RR 2d 1195 (Rev. Bd. 1983) (site issue added after site owner advised would-be applicant lessee that site would not be made available, even though applicant remained confident).

5. While Ogden has not formally tendered its alternative lease option (see paragraph 2, *supra)* as an amendment to its application, it clearly indicated the intention, in its opposition to Kaldor's petition, to do so, if necessary. It is. And by specifying the same site and facilities as Kaldor (see paragraph 2, *supra*), it will presumably obviate the need for further hearing on technical matters.[2] Also presently lacking is a revised cost estimate and financial plan for constructing the Kaldor-like facilities. Consistent with *Wilson County Broadcast Services, Inc.*, FCC 83R-102, released December 27, 1983, the new certification procedure for financial qualifications is not apposite here, since a limited financial issue was previously specified against Ogden in this proceeding. We shall direct Ogden to file the above-described documents with the Review Board as a formal amendment to its application, within 30 days, and will direct Kaldor and the Chief, Mass Media Bureau to file comments within 15 days thereafter.

6. ACCORDINGLY, IT IS ORDERED, That Ogden Broadcasting Service, Inc. IS DIRECTED to file the amendment described in paragraph 5 of this Memorandum Opinion and Order with the Review Board within thirty (30) days of the Order's release; and Kaldor Communications, Inc. and the Chief, Mass Media Bureau ARE DIRECTED to file comments thereon within fifteen (15) days thereafter.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

---

attempted to exercise its lease option (Tr. 222), which expires on April 15, 1984, nor filed a lawsuit for specific performance or to enjoin Mr. Kuhlman from continuing his construction efforts. And we have not been advised of any subsequent activity departing from Ogden's Nero-like pose (fuming while its site is consumed).

[2] If Ogden opts to specify a new site other than the Kaldor site (see Tr. 242), it will have to meet the established test of good cause for postdesignation amendments set forth in *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143, 18 RR 2d 820, 824 (Rev. Bd. 1970).

FCC 83D-36

BEFORE THE
## FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| KALDOR COMMUNICATIONS, INC.<br>Manhattan, Kansas | BC Docket No. 82-118<br>File No. BPH-810420AC |
| OGDEN BROADCASTING SERVICE, INC.<br>Ogden, Kansas | BC Docket No. 82-120<br>File No. BPH-810427AK |
| For Construction Permit for a New FM Station | |

### *Appearances*

*Thomas Davidson*, *Michael A. Nemeroff* and *Ronald S. Flagg* on behalf of HGB Corporation; *Herbert D. Miller, Jr.* on behalf of Kaldor Communications, Inc.; *Kathy Bible* on behalf of Wildcat Broadcasting Company; *Nathaniel F. Emmons* on behalf of Ogden Broadcasting Service, Inc.; and *Norman Goldstein* and *Lawrence Bernstein* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.

## INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE BYRON E. HARRISON

(Issued: June 20, 1983; Released: June 29, 1983)

### *Preliminary Statement*

1. By *Hearing Designation Order*, BC 2497, released March 1, 1982,[1] the Chief of the Broadcast Bureau (Bureau),[2] acting pursuant to delegated authority designated for hearing on the following issues, the mutually-exclusive FM applications of Kaldor Communications, Inc. (Kaldor) and Ogden Broadcasting Service, Inc. (Ogden):[3]

(1) To determine the areas which would receive primary aural service of 1 mV/m or greater from the proposed operations of HGB Corporation, Kaldor, Wildcat

---

[1] 47 Fed. Reg. 9278, published March 4, 1982.

[2] Now the Mass Media Bureau.

[3] The *Designation Order* also included the mutually-exclusive applications of HGB and Wildcat. By *Memorandum Opinion and Order* (FCC 82M-2760), released September 13, 1982, these applications were dismissed with prejudice.

Broadcasting Company and Ogden and the availability of other primary service to such areas and populations.

(2) To determine whether the proposal of Kaldor to locate the main studio outside its community of license is in compliance with Section 73.1125 of the Commission's Rules with respect to location of the main studio and, if not, whether circumstances warrant a waiver of that section.

(3) To determine with respect to Ogden:

(a) the source and availability of additional funds over and above the $65,100 indicated, and

(b) whether in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

(4) To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of radio service.

(5) To determine, in the event it is concluded that a choice between the applications should not be based solely on considerations relating to Section 307(b), which of the proposals would, on a comparative basis best serve the public interest.

(6) To determine, in light of the evidence adduced pursuant to the foregoing issues, which, if any, of the applications should be granted.

2. Issues 3(a) and (b) relative to the financial qualifications of Ogden were resolved in favor of Ogden by summary decision prior to the hearing. *Order*, FCC 82M-1950, released June 21, 1982. The hearing on the remaining issues was held on July 27, 1982 and the record was closed on September 9, 1982. *Order*, FCC 82M-2761, released September 13, 1982. Proposed findings of fact and conclusions of law were filed by the Bureau and the applicants on November 19, 1982 and both applicants filed reply findings and conclusions on December 10, 1982.

## *Findings of Fact*

### *Kaldor Main Studio Location Issue (Issue 2)*

3. This issue was specified because Kaldor failed to demonstrate good cause for its waiver request to locate its main studio outside of Manhattan, the principal community to be served (*Designation Order* at paragraph 3).

4. Daniel R. Weir, Secretary-Treasurer, 20% stockholder and Director of Kaldor testified that the proposed studio site is to be located at the transmitter site which is less than 0.2 miles outside Manhattan, Kansas (Kaldor Exhibit 2, p. 1)[4] (Kaldor Exhibit 1, p. 1; Tr. 51–54, 75).

---

[4] An engineering exhibit was submitted on April 5, 1982 as a part of a Petition to Enlarge which depicted the proposed site as being about 1¼ miles outside the city limits. However, this exhibit failed to take into account recent annexations by the City of Manhattan (Tr. 57, 74).

5. According to Weir, the trip from the city boundary to the proposed studio site takes less than 37 seconds and with improvement of the access road, the driving time should be less (Kaldor Exhibit 2, p. 2). Weir recognizes that while the access road is currently good, increased useage will require more maintenance. It is Weir's belief that there are many alternatives as to methods to improve the road which would be acceptable to the landlord, but could include paving at a cost of $14,000 to $18,000 (Tr. 59–61). The proposed site is 4.7 miles from the Manhattan Post Office which is located at the approximate center of Manhattan. The total driving time from the Post Office to the studio site is less than 8 minutes—including the 37-second drive from the city limit to the studio (Kaldor Exhibit 2, p. 2). There is no public transportation in Manhattan or the county other than a bus for the aging (Tr. 74).

6. Weir testified that the reason Kaldor could not locate in Manhattan was not financial, but, rather the inability to find a suitable site for the tower in the city. Kaldor had explored possible sites in the city but it appeared that there was no site within the city which could accommodate a 265-foot tower with guy wires. Perhaps more important is the fact that the Manhattan zoning laws consider a radio station to be heavy industry and Kaldor was advised that the zoning laws would make it almost impossible to locate the tower and studio within the city limits (Tr. 62, 64, 73, 78).

7. Kaldor determined that it desired to locate the studio at the same location as its transmitter and tower for several reasons. First, Kaldor proposes to have an auxiliary power generator and if the studio and transmitter are not co-located, two such generators will be necessary at an added cost of $2,000–4,000 (Tr. 61). Also, absent co-location of the studio and transmitter, it will be necessary to install a studio-transmitter link at a cost of approximately $5,000 and maintain a balanced telephone line between the studio and transmitter at a cost of approximately $800 per month (Tr. 62). Weir stated that previous experience during 1969–79 as Operations Manager of an AM-FM facility in Kansas has shown that having the studio and transmitter at different locations was less than satisfactory, particularly in severe weather, which could be anticipated in the area (Kaldor Exhibit 2, p. 2; Tr. 66–78). For these reasons, Kaldor has located its proposed studio-transmitter just outside the city limits of Manhattan where there are no zoning restrictions and in an area located in the direction in which Manhattan is expanding (Kaldor Exhibit 2, pp. 2–3; Tr. 73).

8. Additional advantages of the proposed studio site over a site in Manhattan are represented to include:

(1) No traffic or parking problems.

(2) Due to lower land costs, a larger studio can be built than would be possible in downtown Manhattan.

(3) The Kansas Route 18 bypass adjacent to Kaldor's proposed studio-transmitter site affords quick access from both the main shopping centers in Manhattan.

(Kaldor Exhibit 2, pp. 2–3).

*The Section 307(b) Issue (Issue 4)*

*Manhattan, Kansas*

9. Manhattan, Kansas is located approximately 105 miles west of Kansas City and about 7 miles northeast of Ogden. Most of the city is in Riley County except for a very small portion located in Pottowatamie County, Kansas. Manhattan is the largest community in Manhattan Township and it is the county seat of Riley County (Ogden Exhibit 3, p. 4).

10. According to the 1980 Census, the population of Manhattan was 32,644 which represents an increase of approximately 18.4% since 1970 (Ogden Exhibit 3, p. 3; Kaldor Exhibit 4). Of the total population for Manhattan, 32,482 are located in Riley County (population 63,505) and 162 are located in Pottowatamie County (population 14,782) (Joint Exhibit 1, p. 2).

11. Manhattan operates under the Commission/Manager form of government. Five elected city commissioners serve four or two-year terms, according to the number of votes received. Members of the Manhattan City Commission elect a chairperson each year, who serves as Mayor. A city manager is also appointed by the Commission. The city has a staff of 215 persons in the following eight departments: Human Resources and Personnel; Law; Budget, Finance and Administrative Services; Community Development; Fire; Airport; Parks and Recreation; and Services (Ogden Exhibit 3, p. 4; Kaldor Exhibit 9, p. 55). Manhattan is served by the Riley County Consolidated Police Department and a police station is located in the city (Ogden Exhibit 3, p. 4).

12. Manhattan provides a number of municipal services including libraries, parks, swimming pools, summer entertainment programs, year-round recreational activities, public zoo, fire department, commercial airport, city hall, water treatment plants and water and sewer systems (Ogden Exhibit 3, p. 4; Kaldor Exhibit 9, pp. 34–36). In addition to cultural programs presented by the Kansas State University, there are various civic groups such as the Manhattan Civic Theatre, Riley County Historical Museum and the Manhattan Arts Council which promote cultural activities (Kaldor Exhibit 9, p. 39). There are two hospitals in Manhattan, four nursing homes and numerous medical specialists (Kaldor Exhibit 9, p. 4).

13. Manhattan is part of Kansas Unified School District No. 383, which also serves Ogden, Kansas. Elementary, junior high, high school and vocational programs of study are offered. Two parochial schools, an adult learning center and a "free university" also operate in Manhattan. The American Institute of Banking, Manhattan

Christian and Crum's Beauty School are located in Manhattan. Just adjacent to the city is Kansas State University with an enrollment of 19,982 students (Fall, 1981) (Ogden Exhibit 3, pp. 3–4; Kaldor Exhibit 9, pp. 81–85). According to the 1970 Census, 21% of Manhattan's residents are college students (Ogden Exhibit 3, pp. 3–4; Kaldor Exhibit 9, pp. 70–71).

14. Service organizations active in Manhattan include the American Red Cross, Boy Scouts, Girl Scouts, Disabled American Veterans, Eagles, Knights of Columbus, Lions, Optimist, Shriners, Jaycees, Junior Achievement, NAACP and United Way. Manhattan is served by 35 churches (Kaldor Exhibit 9, p. 39).

15. The major private employers in Manhattan are McCall Pattern Company (600 employees); Farm Bureau, Inc. (400 employees); Steel and Pipe Supply Company (150 employees); Packer Hannifin (150 employees) and Artex Manufacturing (160 employees) (Kaldor Exhibit 9, p. 7).

16. The City of Manhattan has over 160 retail businesses, eight motels and an industrial park (Kaldor Exhibit 9, pp. 17, 32, 36; Ogden Exhibit 3, p. 5). Retail sales in Manhattan, as measured by ½% sales tax revenues are in excess of 200 million dollars (Kaldor Exhibit 9, p. 93). Manhattan is a major transportation center and is served by three major truck carriers, commercial passenger and freight airline service, and bus and train service (Kaldor Exhibit 9, pp. 21, 24, 27).

17. Four radio stations are presently licensed at Manhattan which are:

| *Station* | *Type* | *Facilities* |
|---|---|---|
| KMKF | FM | 101.7 mHz<br>1.70 kW, 400 |
| KMAN | AM | 1350 kHz |
| KSAC | AM | 580 kHz<br>5 kW day-0.5 kW night<br>(Share/WIBW) |
| KSDB-FM | FM<br>(Non-commercial) | 88.1 mHz<br>0.10 kW – 38 feet |

(Ogden Exhibit 3, p. 5; Joint Exhibit 1, p. 11)

Both stations KSAC and KSDB-FM are licensed to Kansas State University. While the KSAC authorization would permit commercial operation, the University operates the station on a non-commercial basis (Joint Exhibit 1, p. 11). Station KSAC operates under a share-time agreement with another station and the University operates the station between the hours of 12:30 P.M. and 5:30 P.M., Monday through Friday, 260 days a year (Tr. 164). Both KSAC and KSDB-FM provide city-grade service to all of Manhattan (Ogden Exhibit 5).

18. Manhattan is also served by a cable television system with 18 channels which has about 10,800 subscribers and which originates about 40 hours of local programming each week from studio facilities located in Manhattan (Ogden Exhibit 3, p. 5; Kaldor Exhibit 9, p. 31).

19. Three newspapers are published in Manhattan. The *Manhattan Mercury* is a daily (Monday-Friday and Sunday) newspaper which has been in publication since 1909, its daily circulation is approximately 13,500 and its Sunday circulation is slightly over 14,000. The *Kansas State Collegian* is published weekdays by Kansas State University and has a daily circulation of 13,800. The *Grass and Grain* is a weekly paper with a circulation of 17,500 which specializes in agricultural news and features. A variety of other periodicals are published in Manhattan (Ogden Exhibit 3, pp. 5–6).

### Ogden, Kansas

20. Ogden is an incorporated and self-governing city in Riley County, Kansas with a population of 1,804 persons (1980 Census). It adjoins Fort Riley, a large U.S. Army Post,[5] and nearby communities include Manhattan, Kansas (seven miles to the northeast) and Junction City, Kansas, about seven miles to the southwest (Joint Exhibit 1, p. 2; Kaldor Exhibit 3, p. 1; Ogden Exhibit 3, p. 1). The city of Ogden is located within Ogden Township, a civil division of Riley County, Kansas. It is also the largest community in the Kansas 65th State Representation District, also known as the Ogden-Wakefield District (Ogden Exhibit 3, p. 1). The Ogden 1980 Census of 1,804 persons represents a 21% increase over 1970 (1,491 persons), but during the 1960-1970 decade, the population declined from 1,780 to 1,491 persons (Joint Exhibit 1, p. 2; Ogden Exhibit 2, p. 1; Kaldor Exhibit 4, p. 1). According to the Mayor, who was a witness, Ogden has approximately 100 owner-occupied dwellings and approximately 200 permanent residents. The balance of the population consists of transient personnel, most of whom are either stationed or employed at Fort Riley and their dependents (Kaldor Exhibit 3, p. 1). The Mayor's estimates are based upon his review of print outs of registered voters, and his familiarity with water bills, which he compared to determine the number of tenants as opposed to permanent residents (Tr. 140–41).

21. Ogden has a Mayor and a five-person city council, all elected to serve two-year terms (Ogden Exhibit 3, p. 1; Ogden Exhibit 6). Employees and officials of Ogden include a city clerk, city judge, clerk of court, building inspector, fire inspector, fire chief and two assistant fire chiefs. All are employed on a part-time basis (Ogden

---

[5] The 1st Infantry Division is headquartered at Fort Riley with approximately 17,000 military personnel and 4,000 civil service employees (Ogden Exhibit 3, p. 3).

Exhibit 3, p. 1; Ogden Exhibit 6). Appointed government bodies in Ogden include Planning and Zoning, Planning and Zoning Appeals and Community Building Committee (Ogden Exhibit 3, pp. 1–2; Ogden Exhibit 6). The only full-time year-round salaried employees are three maintenance workers (Kaldor Exhibit 3, p. 1).

22. Ogden provides a number of municipal services including a public library, a volunteer fire department, a water department, and a sewer department. A city hall, city court facility, a fire station, a recreation center building and a sewage treatment plant are located in the city. Other public facilities in Ogden include a public swimming pool, a playground, baseball and softball diamond and a city park. A U.S. Post Office is located in Ogden. There are cemetery services provided by the city (Ogden Exhibit 3, p. 2; Ogden Exhibit 6). The city provides a "movies in the park" program and soccer, baseball and basketball leagues (Ogden Exhibit 3; Ogden Exhibit 6).

23. Ogden is part of the Kansas Unified School District #383, which also serves Manhattan. An elementary school and a teaching resource center are located in Ogden. Junior high school and high school classes are held in Manhattan. The city is served by the Riley County Consolidated Police Department. A police sub-station is located in Ogden (Kaldor Exhibit 3, p. 1; Ogden Exhibit 3, p. 2).

24. Civic and fraternal organizations in Ogden include the Girl Scouts, Boy Scouts, Rebekahs,[6] Oddfellows,[6] two American Legion Posts, American Legion Women's Auxiliary and Ogden Pride (Ogden Exhibit 3, p. 2; Ogden Exhibit 6). There are also two churches serving Ogden (Ogden Exhibit 3, p. 2; Kaldor Exhibit 3, p. 2).

25. Business activity in Ogden includes retail businesses such as restaurants, grocery stores, gasoline stations, gift shops and service businesses such as insurance agencies, dry cleaners, barber shop and upholsterers. Much of the business caters to military personnel from the nearby U. S. Army military installation at Fort Riley. Total retail sales are approximately 3 million dollars per year as measured by the ½% sales tax revenues (Ogden Exhibit 3, pp. 2–3; Kaldor Exhibit 3, pp. 1–2; Kaldor Exhibit 9).

26. No radio or television stations are licensed to Ogden and the city has no local daily or weekly newspaper. Portions of Ogden are served by the Junction City cable television system. There are no local origination CATV facilities in Ogden (Ogden Exhibit 3, p. 3).

### *Engineering/Comparative Coverage Issue*

### *Facilities Requested*

27. Each applicant seeks a permit to construct a Class A FM broadcast station to operate on Channel 280 (Joint Exhibit 1, p. 0). Kaldor proposes to operate with an effective radiated power (ERP) of

---

[6] The Rebekahs and Oddfellows are no longer active (Tr. 154).

3 kW, using an antenna whose height above average terrain (HAAT) is 275 feet. Ogden proposes to operate with an ERP of 3 kW, using an antenna whose HAAT is 255 feet (Joint Exhibit 1, p. 3b).

*Comparison of Coverage*

28. Since each applicant proposes different technical facilities (para. 27, *supra* ) and transmitter sites, their primary service (1.0 mV/m) contours do not coincide (Joint Exhibit 1, pp. 3a, 3b, 8). The proposed 1.0 mV/m contour of each applicant would serve essentially the same area, except for a crescent-shaped area which extends eastwardly, served exclusively by Kaldor, and a similarly shaped area which extends westwardly, served exclusively by Ogden (Joint Exhibit 1, pp. 3a, 8). A comparison of the areas and populations proposed to be provided with primary service by each of the applicants is tabulated below (Joint Exhibit 1, pp. 9, 10, 10 ½):

| | *Proposed Primary Service* | |
|---|---|---|
| *Applicant* | *Area (sq. mi.)* | *Population* |
| Kaldor | 595 | 76,924 |
| Ogden | 555 | 84,908 |
| Kaldor advantage | 40 (7.2%) | |
| Ogden advantage | | 7,984 (10.4%) |

The common area and population served by the applicants is 463 square miles and 66,900 persons (Joint Exhibit 1, Figure 6-B).

29. With respect to area and population not commonly served by the applicants, Ogden will serve 92 square miles and 18,008 persons, while Kaldor will serve 132 square miles and 10,024 persons (Joint Exhibit 1, Figure 6-B).

30. All portions of the non-common area receive primary daytime aural service from at least five other stations (Joint Exhibit 1, Figures 3, 4-A). However, at night, Ogden and Kaldor will serve certain areas and populations that presently receive fewer than five aural services. The comparison is as follows:

| | *Ogden* | | *Kaldor* | |
|---|---|---|---|---|
| *Number of Existing Nighttime Services* | *Area (Sq. Mi.)* | *Population* | *Area (Sq. Mi.)* | *Population* |
| 0-2 | 0 | 0 | 0 | 0 |
| 3 | 21 | 6,644 | 0 | 0 |
| 4 | 46 | 10,971 | 50 | 9,014 |
| 5 or more | 25 | 393 | 82 | 1,010 |

(Joint Exhibit 1, Figure 6-B).

The foregoing comparison takes into account commercial reception services only. However, because two such reception services operate on a share time basis with non-commercial stations KSAC and KFKU, the number of available commercial reception services is reduced at the times when either KSAC or KFKU is operating on the shared frequencies. Joint Exhibit 1, Figure 6-C considers available nighttime service depending on whether KSAC or KFKU are operating. The population and area data is as follows under these assumptions:

### POPULATION AND AREA DATA

### AVAILABLE NIGHTTIME COMMERCIAL AURAL SERVICES, WHEN (1) *KSAC IS OPERATING, (2) *KFKU IS OPERATING, (3) *KSAC _AND_* KFKU ARE OPERATING

| | | *Kaldor* | | *Ogden* | |
|---|---|---|---|---|---|
| *Non-common Area* | | *Pop.* | *Area (mi.)* | *Pop.* | *Area (mi.)* |
| **No other service** | (1) | 0 | 0 | 0 | 0 |
| | (2) | 0 | 0 | 0 | 0 |
| | (3) | 0 | 0 | 0 | 0 |
| **One other service** | (1) | 0 | 0 | 0 | 0 |
| | (2) | 0 | 0 | 0 | 0 |
| | (3) | 0 | 0 | 0 | 0 |
| **Two other services** | (1) | 0 | 0 | 6,644 | 21 |
| | (2) | 0 | 0 | 0 | 0 |
| | (3) | 8,960 | 47 | 17,358 | 47 |
| **Three other services** | (1) | 9,014 | 50 | 10,971 | 46 |
| | (2) | 8,960 | 47 | 17,358 | 47 |
| | (3) | 1,064 | 85 | 650 | 45 |
| **Four other services** | (1) | 1,010 | 82 | 393 | 25 |
| | (2) | 1,064 | 85 | 650 | 45 |
| | (3) | 0 | 0 | 0 | 0 |
| **Five other services** | (1) | 0 | 0 | 0 | 0 |
| | (2) | 0 | 0 | 0 | 0 |
| | (3) | 0 | 0 | 0 | 0 |
| *Common Area* | | 66,900 | 463 | 66,900 | 463 |
| TOTAL | (1) | 76,924 | 595 | 84,908 | 555 |
| | (2) | 76,924 | 595 | 84,908 | 555 |
| | (3) | 76,924 | 595 | 84,908 | 555 |

* Denotes non-commercial operation.

31. There are four stations licensed to serve Manhattan which are:

| *Call* | *Channel* | *Facilities* |
|---|---|---|
| KMAN(AM) | 1350 kHz | 0.5 kW, D |
| KMAF | 259 | 1.7 kW 400 feet |
| KSAC(AM) | 580 kHz | 0.5 kW |

*LOCAL AM AND FM STATIONS – MANHATTAN/OGDEN*

| *Call* | *Freq./Channel* | *City of License* | *Facilities* |
|---|---|---|---|
| KMAN(AM) | 1350 kHz | Manhattan, Kansas | 0.5 kW, Day |
| *KSAC(AM) | 580 kHz | Manhattan, Kansas | 0.5/5 kW, U (S-WIBW) |
| KMKF(FM) | 101.7 MHz/269A | Manhattan, Kansas | 1.70 kW, 400 feet |
| *KSDB-FM | 88.1 MHz/201 | Manhattan, Kansas | 0.01 kW (Lic.)<br>0.10 kW, -38 feet (CP) |

* Stations operate on non-commercial basis.

(Joint Exhibit 1, Figure 7).

There are no broadcast stations licensed to Ogden (Joint Exhibit 1, Figure 7).

*The Contingent Comparative Issue (Issue 5)*

32. Kaldor is a corporation composed of three stockholders, Rhona L. Weir (60%), Daniel R. Weir[7] (20%) and Richard H. Kaldor (20%). Dr. Kaldor is the President, Mrs. Weir is Vice-President and Mr. Weir is Secretary-Treasurer of the corporation. All three stockholders are also Directors. All three have lived and worked in Manhattan for more than four years (Kaldor Exhibit 2, p. 5).

33. The following other media interests are attributable to Kaldor: (a) Richard H. Kaldor's 10.53% in Taylor Communications, Inc., the licensee of KCLY-FM, in Clay Center, Kansas from 1977 until June, 1981[8] and (b) Mr. Weir until recently held 10% of the stock of Ark City Cable TV, Inc. in Arkansas City, Kansas[8] (Kaldor Exhibit 2, pp. 5–6). Clay Center is 39 miles from Manhattan (Tr. 72).

34. Rhona L. Weir proposes to be the full-time manager and she is a member of the Ouapaw Indian Tribe. Her prior business experience includes the management of a 314-seat restaurant in Manhattan and supervision of 31 employees (Kaldor Exhibit 1). The record shows no past broadcast experience or participation in civic activities for Mrs. Weir.

35. Daniel R. Weir proposes to serve 25 hours per week as Operations Manager of the station. From 1969 until 1979, Mr. Weir was the Operations Manager of Stations KJCK-AM-FM in Junction City, Kansas (Kaldor Exhibit 2, p. 1). The record reflects no participation in local civic organizations or activities.

36. Both Kaldor and Ogden propose to install and maintain emergency power generator equipment to provide power to their proposed facilities during power outages caused by severe weather and other conditions (Kaldor Exhibit 2, p. 2; Ogden Exhibit 4).

37. Ogden is a corporation of two stockholders, Joseph B. McCoy, III (50%) and James R. Bond, Jr. (50%). Mr. McCoy is President and

---

[7] Daniel and Rhona Weir are husband and wife.

[8] Both of these prior interests are attributable to Kaldor for comparative purposes.

a Director of the corporation while Mr. Bond is Vice-President, Secretary, Treasurer and a Director (Ogden Exhibit 1).

38. Neither Ogden nor its principals have any ownership interest in any other broadcast station or other medium of mass communication as of the time the record was closed in this proceeding. Mr. Bond does own 51% of an applicant - North Carolina Radio Service, Inc. - for a new FM station at Elizabeth City, North Carolina which is 1,140 miles from Ogden, Kansas. That application was granted by Initial Decision released May 14, 1982 (FCC 82D-38) and at the close of the record in this case, the Initial Decision was before the Review Board on exceptions filed by a competing applicant.[9] (Ogden Exhibit 2).

39. Neither of Ogden's principals have proposed to be involved in the day-to-day operation of the station.

## *Conclusions of Law*

### *Kaldor Main Studio Location Issue*

1. With certain exceptions, not relevant here, Section 73.1125 of the Rules requires that a station's main studio be located in the community of license unless good cause exists for locating it outside the principal community. The rule "is intended as one means of assuring that the needs and interests of the residents of [the] community [of license] are met and that the station serves as an outlet for local self-expression." *Arizona Communications Corp.*, 25 FCC 2d 837, 839 (1970), *reconsideration denied* 27 FCC 2d 283 (1971). The Commission has stated that "the main studio rules . . . are intended to make broadcast stations readily accessible to the people in the communities which they are primarily licensed to serve . . ." *FM-TV Main Studio Moves*, 27 FCC 2d 851, 852 (1971). Approval has been granted where the goals of the rule are reached despite the fact that the studio is located outside the community of license.

2. Kaldor has demonstrated that it made an effort to locate its studio and tower site within the Manhattan city limit, but it was unable to find such a location that would accommodate both the studio and antenna as well as comply with the zoning laws. Kaldor has also introduced unrebutted evidence that it is desirable to co-locate the studio and transmitter-antenna site so as to avoid expensive and unreliable studio transmitter lines or telephone lines.

3. The findings also show that the proposed site is 0.2 miles from the Manhattan city limits and approximately 4.7 miles from the center of town which is less than a nine-minute drive. Public transportation is not a factor to be considered, since none exists

---

[9] Official Notice is taken that on November 23, 1982, the Review Board issued its decision granting the application of North Carolina Radio Service, Inc. (FCC 82R-67) (Docket Nos. 81-244-46). The Commission denied an Application for Review by *Order* released May 3, 1983 (FCC 83-211).

except in a limited way for elderly persons. It has also been demonstrated that the city of Manhattan is expanding in the direction of the studio-transmitter site location.

4. Accordingly, it is concluded that because the site selected is both proximate and accessible to Manhattan and good cause has otherwise been shown for locating the studio outside Manhattan, the issue is resolved favorably to Kaldor. Cf. *Jerry Lawrence*, 48 FCC 2d 373, 377 (Rev. Bd. 1974).

### *307(b) and Engineering Comparative Coverage Issues*

5. Before proceeding to conclusions on the application of Section 307(b) to the facts of this case, the claim of Kaldor is considered that consideration must be given to "the need to redress the critical underrepresentation of minority group members in the ownership and management of broadcast facilities . . ." citing *Waters Broadcasting Corporation*, 91 FCC 2d 1260 (1982). The question of minority ownership was considered in the *Waters* case as a factor in a comparative hearing between two mutually-exclusive applicants for a new FM station at Hart, Michigan. As such, the *Waters* case involved a comparison of applicants under the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965).

6. Kaldor's request that a minority preference be somehow factored into a Section 307(b) comparison finds no support in the *Waters* case which concerns two mutually-exclusive applicants for the same city. If there are two or more applicants who have filed for different communities, a determination is required under Section 307(b) of the Act as to which of the communities has the greater need for the requested facility. Under this statutory standard, only communities are evaluated - not applicants. The Commission has designed a number of policies "to alleviate the broad underrepresentation of minorities in the ownership councils of the broadcast industry". See *Petition for Issuance of a Policy Statement or Notice of Inquiry*, 59 FCC 2d 1591 (1978). For instance, it has developed an Equal Employment Opportunity Program. See *Form 301, Section VI and Equal Employment Opportunity Commission*, 25 RR 2d 813 (1972). It has implemented a "Distress Sale Policy". See *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978). An ownership preference or advantage has been accorded in the comparative hearing context. See *Barnes Enterprises, Inc.*, 69 FCC 2d 1957 (1978); *Mid-Florida Television Corporation*, 70 FCC 2d 281 (1978) and *Waters, supra*. Technical engineering rules (73.37(e)) have been waived for minority applicants. See *Por Favor*, 42 RR 2d 1667 (1978). Minority applicants have been afforded special procedural treatment. See *Expedited Processing for Two D. C. Minority Applicants Affirmed*, Report No. 16729, Mimeo 18134, released June 4, 1979.

7. Section 307(b) of the Communications Act requires that ". . .

the Commission shall make distribution of licenses, frequencies, hours of operations and of power among the . . . communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." In summary, the Commission has afforded preferences or merits to minorities in a number of areas, but, such preferences and merits have not been extended to Section 307(b) considerations. Section 307(b) of the Act requires the comparison to be between communities in this case, and not applicants.[10]

### *Section 307(b) Considerations*

8. It is well settled that in cases involving mutually-exclusive applications who will serve different communities and different areas and populations, Section 307(b) considerations predominate, if a significant preference arises under Section 307(b), that preference is dispositive and a comparison of the applicants is irrelevant. The Commission has defined the applicable 307(b) considerations in terms of three objectives, listed in order of importance:[11]

> (1) Provision of same service to all of the nation, or as much as possible;
>
> (2) Provision of as many program choices to as many listeners as possible; and
>
> (3) Service of local origin to as many communities as possible.

This proceeding involves the mutually-exclusive applications of Kaldor of Manhattan, Kansas and Ogden of Ogden, Kansas, for a new FM broadcast station. Each applicant seeks a permit to construct a Class A FM broadcast station to operate on Channel 280. Kaldor proposes to operate with an effective radiated power (ERP) of 3 kW, using an antenna whose height above average terrain (HAAT) is 275 feet. Ogden proposes to operate with an ERP of 3 kW, using an atenna whose HAAT is 225 feet.

### *The Communities to be Served*

9. The city of Manhattan has a population of 32,644, of which 32,482 are located in Riley County (population 63,505) and 162 are located in Pottowatamie County (population 14,782). The city of Ogden (population 1,804) is located in Riley County and is approximately 9 miles southwest of Manhattan. Manhattan being the larger city, has substantially more business, cultural, religious and governmental activities than does Ogden.

### *Comparison of Coverage*

10. There is a minimum of five existing services during the day

---

[10] Under the contingent comparative issue, Kaldor's assertion of a minority preference will be considered.

[11] See discussion in *WHW Enterprises, Inc.*, 89 FCC 2d 799, 808–09 (Rev. Bd. 1982) and *FM Broadcast Rules*, 40 FCC 662, 664 (1962).

to the entire area proposed to be served by each of the applicants. Accordingly, there are abundant existing reception services available during the daytime and neither applicant is entitled to a preference for its proposed daytime service. *Resort Broadcasting Co., Inc.*, 41 FCC 2d 640, 643 (Rev. Bd. 1973).

11. Ogden will serve 7,984 more people than Kaldor. Ogden will provide a fourth nighttime aural service to 6,644 people and a fifth nighttime service to 10,971 people, whereas Kaldor would provide a fifth nighttime aural service to 9,014 people. If non-commercial services were not counted, then at certain times, Ogden would provide a third service to 6,644 persons. Thus, Ogden will bring service to more underserved people than would Kaldor.[12] Under these circumstances, Ogden merits a moderate preference under the reception service aspect of Section 307(b). See *Meredith Colon Johnston*, 33 FCC 2d 324, 333–34 (Rev. Bd. 1972). Such preference has been afforded in situations where the prevailing applicant would bring a fourth service to 296 persons and a fifth service to 499 persons. In summary, Ogden merits a moderate preference for its service to underserved areas. *Town and Country Radio, Inc.*, 70 FCC 2d 572, 575 (1978).

12. Two commercial aural broadcast stations are licensed to Manhattan. No broadcast station is licensed to Ogden. In resolving a Section 307(b) issue, the Commission looks not only to the needs of the respective communities for a transmission service, but also to the needs of the population to be served by the reception service. *Cherokee Broadcasting Co.*, 17 FCC 2d 121 (1969); *Meredith Colon Johnston, supra* at 33 FCC 2d 331 (Rev. Bd. 1972); *WHW Enterprises, Inc., supra.* at 89 FCC 2d at 809; *Bie Broadcasting Co.*, 81 FCC 2d 1, 24 (Rev. Bd. 1980) and *Du Page County Broadcasting, Inc.*, 19 FCC 2d 250, 251 (Rev. Bd. 1969).

13. Ogden merits a decisional preference under the Section 307(b) issue for both the transmission aspect - first local service and the reception aspect - service to more people overall and service to more persons in underserved areas. In proposing Ogden's first local transmission, Ogden serves the third priority of Section 307(b) while Kaldor does not. In proposing service to more people in underserved areas, Ogden serves the second priority better than Kaldor. A preference on one of the two priorities would be sufficient to grant the Ogden application and deny the Kaldor application. However, while the case is decided under the Section 307(b) issue, the contingent comparative issue is also considered.

---

[12] Kaldor does serve a larger area than Ogden (595 square miles compared to 555), but the reception service aspect of Section 307(b) turns on population rather than area. *Charles Vanda*, 4 FCC 2d 655, 658 (Rev. Bd. 1966).

### *Contingent Comparative Issue*

### *Diversification*

14. Ogden merits a slight diversification preference because it has no other media interests, while Kaldor does. Kaldor's President and 20% owner, Richard H. Kaldor, is charged with a 10.5% ownership of an FM station only 39 miles from Manhattan. Another 20% stockholder, Daniel R. Weir, is charged with 10% ownership of a cable television system in the same state and for diversification purposes this interest is also attributable to Mr. Weir's wife, Rhona L. Weir, a 60% stockholder. *Alexander S. Klein, Jr.*, 49 RR 2d 606, 609–10 (1981). Ogden's principal, James R. Bond, Jr., is a 51% principal of an applicant for an FM station in North Carolina. It is well established that mere pending applications are to be "wholly disregarded" in any comparative evaluation under the diversification criterion. *Theodore Granik*, 8 FCC 2d 1074 (Rev. Bd. 1967) and *Hi-Point Broadcasting Co.*, 14 FCC 2d 365, 366 (Rev. Bd. 1968). However, even if the North Carolina broadcast is considered and that construction permit was granted subsequent to the date this record was closed, this still would not detract from the slight preference awarded to Ogden.[13] Mr. Bond's 51% interest in a station over 1,000 miles distant from the town of Ogden is "not sufficiently impactive" to affect Ogden's preference under the diversification criterion. *Minneapolis Star and Tribune Co.*, 88 FCC 2d 1604, 1609 (Rev. Bd. 1982).

### *Integration*

15. Kaldor is entitled to a substantial preference for its proposal to integrate its 60% stockholder, a female and a member of an American Indian Tribe, with past broadcast experience, as General Manager and a 20% stockholder with some broadcast experience as part-time Operations Manager. This preference for Kaldor is enhanced by the local residence of all of its principals and the minority status of Mrs. Weir.

16. Ogden, on the other hand, has no local stockholders and proposes no integration.

### *Comparative Coverage*

17. Comparative coverage is relevant not only under the Section 307(b) issue, but also under the contingent comparative issue. *Kent-Ravenna Broadcasting Co.*, 22 RR 605, 613 (1961) and *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 398–99 (1965). Ogden will serve 7,984 more people than Kaldor overall, and will provide a fifth nighttime service to 1,957 more people which merits a slight comparative preference. A slight comparative prefer-

---

[13] See Footnote 9 *supra*.

ence was awarded to the applicant who would serve 3,739 more persons and would bring a third nighttime service to 1,796 persons, fourth nightime service to 315 persons and a fifth nighttime service to 945 persons. *CJL Broadcasting, Inc.*, 88 FCC 2d 750, 757–58 (Rev. Bd. 1981). See also *Erwin Gladdenbegk*, 39 FCC 2d 575, 588 (Rev. Bd. 1973).

### *Auxiliary Power*

18. Neither applicant is entitled to a preference for auxiliary power, since both propose to provide auxiliary power facilities.

### *Overall Comparative Comparison*

19. Ogden is the preferred applicant. Given the relative weight to be accorded the various factors, Ogden has a slight diversification preference and a slight comparative coverage preference which outweigh Kaldor's integration preference. Diversification is a comparative factor of principal importance. *Colorado West Broadcasting, Inc.*, 57 FCC 2d 526, 530 (Rev. Bd. 1976).

### *Ultimate Conclusion*

20. Waiver of the main studio location for Kaldor has been shown to be warranted. However, Ogden's application is granted because it will provide service to the preferred community under the transmission aspects of Section 307(b) and because of Ogden's superior coverage under the reception aspects of Section 307(b). Since the Section 307(b) issue is dispositive, the remaining contingent comparative issue need not be reached. However, Ogden would also be preferred under this issue because of its diversification preference which outweights Kaldor's integration preference.

21. Accordingly, IT IS ORDERED, that the application of Kaldor IS DENIED and the application of Ogden IS GRANTED.[14]

FEDERAL COMMUNICATIONS COMMISSION
BYRON E. HARRISON, *Administrative Law Judge*

---

[14] **Under Rule 1.276, appeals (in the form of exceptions to the Initial Decision) must be filed within thirty (30) days of the public release of the full text hereof, unless an extension of time is granted. In the event no exceptions are filed and the Commission has not undertaken to review the Initial Decision during the prescribed 50-day period or taken any of the actions specified in paragraph (c) of Rule 1.276, the Initial Decision becomes effective pursuant to paragraph (c) of Rule 1.276.**

Cellular Communications Systems
Comparative Criteria
Comparative Hearing,
Mobile Radio Service, Cellular Applications

Initial Decision affirmed granting cellular nonwireline application where one applicant's proposed system covers more area and population, its identification and analysis of demand was more reliable, its system design was based on its analysis of demand (slight preference for the manner it proposes to accommodate local demand) overcomes opponent's slight preference for its usage sensitive rate structure (not rate levels).
-*MCI Cellular Telephone Company* (Pittsburgh).
CC Docket No. 82-796.

Cellular Communications Systems
Comparative Criteria
Comparative Hearing
Mobile Radio Service, Cellular Applications

Initial Decision granting nonwireline cellular application affirmed with modifications. Judge's award of a preference for one applicant's ability to accommodate demand for roamer service and its expansion plan are reversed. Applicants will provide roamer service and their systems are capable of accommodating this demand. The applicants' expansion plans are not set forth with sufficient detail to warrant a preference.
-*MCI Cellular Telephone Company* (Pittsburgh).
CC Docket No. 82-796

Cellular Communications Systems
Comparative Criteria
Comparative Hearing
Mobile Radio Service, Cellular Applications

Initial Decision granting nonwireline cellular application affirmed with modifications. Judge's finding that a fundamental principle of cellular design requires that the spacing between cells follow as uniform a pattern as possible and that one applicant's system would suffer intra-system interference in its initial configuration and as the system expands, reversed.
-*MCI Cellular Telephone Company* (Pittsburgh).
CC Docket No. 82-796.

FCC 84-61

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Application of | CC Docket No. 82-796 |
| MCI CELLULAR TELEPHONE COMPANY | File No. 26111-CL-P-(14)-82 |
| CELCOM COMMUNICATIONS CORPORATION OF PITTSBURGH | File No. 26157-CL-P-(11)-82 |
| CELLULAR MOBILE SYSTEMS OF PENNSYLVANIA, INC. | File No. 26184-CL-P-(16)-82 |
| For a Construction Permit to establish a new cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Pittsburgh, Pennsylvania, Standard Metropolitan Statistical Area | |

*Appearances*

*Ruth S. Baker-Battist*, *Anne E. Johnston*, *John Pelkey* and *Melody A. Virtue* on behalf of MCI Cellular Telephone Company; *Jonathan D. Blake*, *S. William Livingston*, *Thomas William Mayo* and *Alan A. Pemberton* on behalf of Celcom Communications Corporation of Pittsburgh; *Edward P. Taptich*, *Lawrence Movshin* and *Patrick Whittle* on behalf of Cellular Mobile Systems of Pennsylvania, Inc.; and *James O. Juntilla* and *Robert W. Spangler* on behalf of the Separated Trial Staff, Common Carrier Bureau, Federal Communications Commission.

## DECISION

(Adopted February 24, 1984 Released March 6, 1984)

BY THE COMMISSION: Commissioner Quello concurring and issuing a statement; Commissioner Dawson issuing a separate statement.

## I. *BACKGROUND*

1. This and a companion case involving the Chicago market are the first two proceedings to reach the Commission for final decision under the expedited hearing procedures established in *Cellular Communications Systems*, 86 FCC 2d 469 (1981), *modified* 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982). The captioned applicants have filed exceptions to the Initial Decision of former Chief Administrative Law Judge Lenore G. Ehrig in the Pittsburgh

nonwireline cellular proceeding. *MCI Cellular Telephone Co.*, 83D-43, released July 29, 1983. The Initial Decision (*I.D.*) granted the application of MCI Cellular Telephone Company (MCI) and denied the mutually exclusive applications of Celcom Communications Corporation of Pittsburgh (Celcom), and Cellular Mobile Systems of Pennsylvania, Inc. (CMS). Judge Ehrig concluded that MCI's application was superior under all the designated issues[1] and that a grant of MCI's application would serve the public interest, convenience, and necessity. CMS and Celcom except to virtually every aspect of the *I.D.*, and MCI excepts on one point. For the reasons stated below we affirm the *I.D.*, as modified by this Decision and we affirm the grant of the MCI application. Except as otherwise noted, the Findings of Fact and Conclusions of Law of the *I.D.* are incorporated by reference herein.

2. On December 1, 1982, the Common Carrier Bureau designated the mutually exclusive applications of MCI, Celcom, and CMS for comparative hearing on the following issues:

> (a) To determine on a comparative basis the geographic area and population that each applicant proposes to serve; to determine and compare the relative demand for the services proposed in said area; and to determine and compare the ability of each applicant's cellular system to accommodate the anticipated demand for both local and roamer service;
>
> (b) To determine on a comparative basis each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed CGSA in order to meet anticipated increasing demand for local and roamer service;
>
> (c) To determine on a comparative basis the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities); and
>
> (d) To determine, in light of the evidence adduced under the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience and necessity.[2]

The Common Carrier Bureau's Separated Trial Staff was also made a party to the proceeding.

3. Pursuant to the special procedures governing evaluation of cellular radio applications for the top-30 markets, 47 CFR 22.916(b)(1), the applicants filed their direct cases with their applications on June 7, 1982. Rebuttal testimony and supplemental direct case testimony were filed by the applicants on January 27, 1983, and April 11, 1983, respectively. A hearing session was held on April 19, 1983 at which time the Presiding Judge ruled on objections, admitted relevant exhibits into evidence, and ruled on requests for

---

[1] See para. 2, *infra.*

[2] MCI Cellular Telephone Co., (Pittsburgh Order), 52 RR2d 1104 (Com. Car. Bur. 1982) (Footnotes omitted).

cross-examination. The record was closed on this same date. Thereafter, the parties filed Proposed Findings of Fact and Conclusions of Law and Replies on May 25, 1983 and June 7, 1983, respectively.

4. In her *I.D.*, the judge gave MCI a substantial comparative preference under issue (a) for its proposed geographic area and population, as well as its identification of, and ability to accommodate anticipated demand for service. MCI also was awarded a comparative preference under issue (b) for its proposal concerning system expansion. The judge gave CMS a comparative preference on issue (c) for its proposed rates and charges, but concluded that this preference did not outweigh the preference accorded to MCI.

5. On September 2, 1983, CMS, Celcom, and MCI filed exceptions. CMS also filed a Motion to Reopen the Record.[3] CMS and Celcom except to virtually every aspect of the *I.D.*, each concluding that it should be granted the cellular construction permit. MCI excepts to the finding that CMS is preferred on issue (c). The parties filed replies on September 15, 1983.

6. On September 22, 1983, Celcom and CMS filed motions for oral argument. The Trial Staff filed comments supporting the motions. By *Order*, FCC 83-580, released December 9, 1983, the Commission set this case for argument on January 10, 1984. All parties participated in the oral argument.[4]

7. We note at the outset that the comparative process has not resulted in our finding that one of the applicants is unqualified to operate a cellular system or that one of the proposals is unworkable. The applicants propose different technical solutions to the problems of cellular system design. Our selection of MCI's application does not indicate that MCI's, approach is the only feasible one. Moreover, we believe that the inherent flexibility of the cellular concept would

---

[3] See para. 56, *infra*. On February 6, 1984, CMS filed a Petition for Leave to Amend. In the amendment accompanying the Petition CMS seeks to amend its application pursuant to Section 1.65 of the rules, reporting that it has substituted two of its officers, J. Douglas Wells and Paul Dawes. We will grant CMS' petition and accept the amendment for the limited purpose of keeping the application accurate and complete. We have not considered the merits of the amendment in making our decision.

[4] On January 27, 1984, Celcom filed a Motion For Leave to File Supplemental Memorandum Concerning Recently Decided Authority and Procedure. CMS filed Comments and the Separated Trial Staff filed an Opposition on February 2, 1984. In the Supplemental Memorandum accompanying the motion, Celcom urges us to consider in this proceeding certain findings and conclusions in the Portland, Oregon cellular Initial Decision, FCC 84D-5, released January 26, 1984, that it argues conflict with findings and conclusions favoring MCI in the *I.D.* in this case. It also argues that the Commission may use a lottery procedure to select a winner if it finds two or more applicants substantially equally qualified. We deny the Motion. We will not consider the Portland decision here, as the record of that proceeding is not before us and that case is, in any event, subject to our review on exceptions at a later date. Regarding Celcom's lottery proposal, see para. 57, *infra*.

allow any of the applicants to reconfigure its system in order to meet the requirements of the marketplace.

8. In this proceeding, however, we are constrained to compare the applicants on the basis of the systems they have proposed, not on the basis of what might ultimately evolve.[5] We find that, based on the record before us, there are differences among the applicants sufficient to make a choice under the comparative criteria previously established. As we have already stated, however, we believe that any of the applicants is capable of providing cellular service to the public. Given this fact, we note that it is debatable whether the public ultimately benefits by our selection of the applicant that is superior with regard to our comparative criteria, in view of the costs in time and resources to the applicants and our staff, as well as the fact that the hearing process significantly delays service to the public.[6] Despite these reservations about the value of the comparative process, we find that the *I.D.* should be affirmed.

## II. *Issue (a)*

9. This issue calls for a comparison of the geographic areas and population which the applicants propose to serve, the relative demand for services in these areas and the ability of each applicant's system to accommodate the anticipated demand for both local and roamer service. In *Cellular Communications Systems*, 86 FCC 2d at 502, we stated that the geographic area which an applicant proposes to serve would be a major basis of comparison. We also stated that "the presence of densely populated regions, highways, and areas likely to have high mobile usage characteristics, as well as indications of a substantial public need for the services proposed, including results of public need surveys" would be significant factors to consider. *See also Pittsburgh Order*, *supra* note 2, at n. 12.

10. *Geographic Area and Population*. The judge found that the applicants propose to serve the following areas and population:

---

[5] It is worth noting the likelihood that substantial modifications will be made in the proposed system when it is built. We recognize that the system designed to win the license may not be the system designed to serve the public. For the opinions of two engineers experienced in cellular system design, see "Re-engineering Often Necessary Says Systems Contractor," *Cellular Business*, January/February 1984, at 8–9. Nevertheless, in a comparative hearing we must base our decision on the systems proposed.

[6] In this connection, we point out that the Commission has pending a Notice of Proposed Rulemaking to adopt a lottery procedure for selecting cellular licensees with less delay. *Cellular Lottery Notice*, FCC 83–460, 48 Fed. Reg. 51493 (released November 11, 1983). Our decision today is without prejudice to any action we may take in that proceeding. In addition, we have long encouraged settlements between applicants for cellular systems, which tend to minimize the administrative costs to the parties and the Commission as well as eliminate the delays inherent in the hearing process. We can only express our disappointment that a settlement was not reached in this case.

| | *Geographic Area Served*[7] | | *Population* | |
|---|---|---|---|---|
| Celcom | 2197 sq. mi. | 71.9% | 2,101,315 | 92.8% |
| CMS | 2394 sq. mi. | 78.4% | 2,161,433 | 95.5% |
| MCI | 2610 sq. mi. | 85.5% | 2,195,146 | 96.9% |

The judge gave MCI a slight preference for its greater coverage area and population encompassed by its 39dBu contours.

11. CMS and Celcom argue that MCI should not be awarded a preference for its coverage in area and population. They argue that the areas covered by MCI and not covered by themselves are fringe areas unlikely to exhibit demand for service. Celcom further claims that these fringe areas could be served only by including significant extensions of the 39 dbu contours outside the MSA, whereas Celcom carefully plotted its contours within the MSA in accordance with its understanding of Section 22.903(a) of the Commission's rules.[8]

12. On review, we conclude that the judge was correct in awarding MCI a slight preference on this issue. In *Cellular Communications Systems*, 86 FCC 2d at 502, we indicated that, because nationwide availability of service is a primary goal, the geographic area which an applicant proposes to serve is a major basis of comparison. MCI proposes to serve 13.6% more area than Celcom and 7.1% more area than CMS. MCI's area would include 33,713 more people than CMS' (1.4%) and 93,831 more than Celcom's (4.1%).

13. We agree with CMS that an examination of this issue requires more than an analysis of the area and population. Judge Ehrig also considered the presence of densely populated regions, highways and areas likely to have high mobile usage characteristics (*I.D.*, para. 53–54). An examination of the demographics in non-common areas or "pockets" of coverage provides further support for our decision to affirm the slight preference to MCI. (Non-common areas are service areas which were covered by one applicant but not

---

[7] For purposes of comparison the geographic area served represents the total area within the Metropolitan Statistical Area (MSA) covered by the applicants' 39 dBu contours. The percentages represent the applicants' proposals compared to the total area (3,054 sq. miles) and population (2,263,894 persons) of the Pittsburgh MSA, according to the 1980 census. *I.D.*, at para. 7. The percentages of the geographic area served listed above are different from the percentages enumerated in para. 7 of the *I.D.* because, it appears, these latter percentages were based on data supplied by the parties, which were inconsistent with other findings by the judge. Accordingly, we have conformed the percentages of geographic area served to reflect the findings of the judge. We have also conformed CMS' figure for area and population. CMS Report at 2, 3 [Report on Areas and Populations filed at the judge's request. *See I.D.* at n.2].

[8] Section 22.903(a) prohibits extensions of an applicant's Cellular Geographic Service Area beyond the boundaries of the MSA except *de minimis* extensions. The area outside the MSA is not considered comparatively, in any event. *See* note 9, *infra*. Further, the portion of the CGSA outside the MSA will not be afforded interference protection. *See* note 31, *infra*.

covered by another.) MCI's proposal fails to include a portion of Westmoreland County containing a section of Interstate I-70. The proposals of Celcom and CMS exclude portions of Washington and Westmoreland Counties containing I-70, Highway 51, Routes 28 and 58, and the Pennsylvania Turnpike, and a portion of Allegheny County containing the Pennsylvania Turnpike and Highway 80. Celcom's proposal also fails to cover an area in Beaver County containing a section of the Pennsylvania Turnpike and the access route to Ellwood City. In summary, while each applicant fails to cover certain areas within the MSA, the coverage of Celcom and, to a lesser extent, CMS, excludes more areas containing major highways. In addition, while many of the non-common areas are at the fringe of the MSA, MCI's more comprehensive coverage should provide better service to users in cars in these areas, including better coverage for roamer traffic. MCI's non-common areas are likely to have a higher level of demand than CMS' or Celcom's. MCI Rebuttal Case, Exhibit 2, pp 6–21. In summary, in view of the mandate for nationwide cellular service and because MCI's system more effectively covered major highways within this MSA, we affirm the judge's finding that MCI's system deserves a slight preference.

14. We reject Celcom's argument that MCI should not receive comparative credit for coverage areas resulting from extensions beyond the MSA. Celcom did not petition to deny MCI's application based on the extensions of the 39dBu contours during the public notice period in July 1982. The Commission's rules and policies specifically permit the design of systems whose 39 dBu contours extend beyond the MSA, as long as such extensions are *de minimis*. *See Order on Reconsideration*, 89 FCC 2d at 87. If an applicant is able to provide better coverage within the MSA by the use of such extensions, it deserves comparative credit for such coverage. In this case, MCI's extensions were greater than Celcom's, but the degree of extension is not relevant, because MCI's extensions satisified the *de minimis* standard. MCI's coverage *within* the MSA[9] is superior to that of Celcom; accordingly a slight preference is warranted.

15. *Relative Demand for Service*. Each of the applicants forecasted demand for cellular radio service in the Pittsburgh MSA as follows (*I.D.*, para. 9):

| | *Celcom* | *MCI* | *CMS* |
|---|---|---|---|
| Year 1 | 500 | 1,000 | 2,049 |
| Year 2 | 2,100 | 2,200 | 4,761 |
| Year 3 | 4,200 | 3,500 | 8,158 |
| Year 4 | 6,600 | 5,100 | 10,877 |
| Year 5 | — | 6,800 | 13,584 |

16. The judge awarded MCI a preference for its determination

---

[9] Coverage of areas *outside* the MSA has not been considered.

and analysis of demand because, she found, the Celcom and CMS studies were seriously flawed in several respects. Celcom's analysis of relative demand for service was found to be patently defective because, by Celcom's own admission, its market research played no part in its determination of projected demand in Pittsburgh, but rather was used to provide additional information relating to cellular need and demand in the MSA. Celcom also admitted that its survey was not intended to be a statistically valid study, or to produce a sales forecast of subscribers for the Celcom system. (*I.D.*, para. 55). The judge found CMS' research to be seriously flawed because CMS did not document its underlying assumptions or demonstrate how the results of the research were relied upon in arriving at its demand projections. Further, the judge found that CMS' demand projection did not consider the presence of a wireline carrier in Pittsburgh. On the other hand, the judge found MCI's survey did not contain flaws that were fatal to the trustworthiness of MCI's research.

17. Both Celcom and CMS argue that the judge erred in giving a preference to MCI because the judge disregarded serious methodological errors in MCI's survey, while erroneously finding serious flaws in their demand surveys. CMS argues that the judge's rejection of its paging demand survey, which was based on CMS' failure to demonstrate a nexus between paging and cellular, was unwarranted. CMS also faults the judge's criticism of its apparent failure to consider the personal, as opposed to business, use of cellular. Celcom claims that MCI's preference is based more on the quality of the market research done by hired consultants; that there was no evidence that MCI's survey played a meaningful role in developing its cellular system or that its study results in a better cellular design; and that there was no evidence of demand in any non-common areas. In order to assess these exceptions, we first examine the survey methodology used by each applicant.

18. MCI's forecast of realizable demand is based predominantly on a public need survey.[10] This survey was designed by SRI International,[11] an independent consulting firm, and was conducted by telephone by Chilton Research Services; it consisted of the presentation of a questionnaire to a sample of 796 respondents in the Pittsburgh MSA, who were selected by random digit dialing from

---

[10] MCI also conducted two surveys to provide qualitative insight into cellular demand. One survey consisted of a telephone survey of 100 business in the Pittsburgh MSA to elicit information regarding the level of interest in cellular service, price sensitivity, and likely usage patterns. *I.D.*, para. 11. MCI also commissioned Lieber Attitude Research to conduct a series of "focus group" sessions to study the attitudes and needs of potential cellular subscribers. *I.D.*, para. 12.

[11] SRI also conducted an analysis of demographic and economic information concerning the Pittsburgh MSA.

households with incomes of at least $20,000. The result of this survey, the gross potential demand, was reduced by an Intent Translation Scale, to take into consideration MCI's assumption that respondents in surveys of this type will indicate a greater willingness to subscribe than will be found in practice. The Intent Translation Scale, according to MCI, was based on empirical studies. As a result, MCI predicted the total realizable demand for cellular service in Pittsburgh to be 24,100 (MCI Ex. 28). MCI analyzed various factors such as elasticity of demand, the introduction of new features and service capabilities, and the realizable demand (in terms of potential subscribers) to develop its 5 year subscriber forecast (*I.D.*, para. 10). MCI used maps showing population density for the Pittsburgh area to determine the total population of the cells in the system. Subscribers were then apportioned among the cells in the same proportion as the population served by that cell (MCI App. Ex. 5, at 5–7). The number of channels for each cell was determined by using the market research estimates of the total number of subscribers expected and the grade of service desired.

19. Celcom conducted a telephone survey of 100 businesses in the Pittsburgh MSA selected from a telephone directory. Although the survey was conducted to determine and confirm the demand for cellular service, Celcom admitted that this study was not intended to be a scientific statistical poll or survey, or to produce a sales forecast of subscribers on the Celcom system (Celcom Ex. 2; *I.D.*, para. 13).

20. To arrive at its subscriber forecast, CMS conducted various market research studies. CMS' first nationwide study, the Claritas Corporation survey, was designed to estimate demand for cellular service by analysis of pager penetration rates in various markets in which CMS' parent, Graphic Scanning Corporation, offers paging services. (CMS Ex. II, Dir. Case Vol. 2, Section I; *I.D.*, para. 15). Market-to-market differences were explained by the distributive mix of standard industrial classification (SIC) within individual markets. The second nationwide study was a telephone survey of private businesses conducted by Westat. Data for the 73 Pittsburgh interviews were combined with data from the total sample of 2,171 interviews for the other top-30 cellular markets, using a composite estimation procedure. (CMS Dir. Case Vol. 3). CMS also conducted two telephone surveys in the Pittsburgh market. One of these surveys was aimed at Graphic Scanning pager customers in Pittsburgh; the other one concentrated on the general business population in Pittsburgh. Graphic Scanning also conducted two mail survey similar to the telephone surveys.[12] (CMS Dir. Case Vol. 2, Sections II-

---

[12] In the telephone survey of the general population of businesses in the Pittsburgh MSA 66 interviews were completed. In the telephone survey of Graphic's pager customers 106 interviews were completed. In the mail survey of businesses 102 questionnaires were returned, and 95 questionnaires from Graphic's customers were returned. (CMS Dir. Case Vol. 2, Sections II-V).

V). Nowhere, however, did CMS document how its six studies were used to arrive at the cellular penetration factor, the critical element used in determining CMS' five-year projection of cellular demand. (*I.D.*, paras. 14–17). CMS projects demand in Pittsburgh based on a projected need of 6 cellular units per one thousand population.[13] Based on the 1980 census population count, CMS projects the total market need for Pittsburgh to be 13,584 units. (CMS Direct Case Vol. 2, Ex. 2, at 14).

21. We agree with the ALJ's conclusion that Celcom's and CMS' studies have serious shortcomings. Celcom itself admitted that its analysis of relative demand for service was not statistically valid and was used only to provide ancillary demand information. The underlying assumptions for CMS' studies are not documented in the record. CMS' assumption that paging is the precursor of cellular radio limited its sample group without adequate explanation. In addition, although CMS has suggested reasons why it used paging as a product precursor for cellular, it has failed to establish a direct link between demand for paging and demand for cellular. The record also does not demonstrate that CMS used the results of its market research to arrive at its market projection and demand distribution in Pittsburgh. However, even if we were not to find flaws in CMS' studies, we still would not credit it with reasonable market projections. CMS did not adequately explain how it arrived at its market projections. For instance, it does not explain how or why it projected units per thousand population when its surveys only consisted of business establishments. Moreover, the need factor applied has no basis in the record. The fact that CMS states that it projects the total market need for Pittsburgh to be 13,584 units supports the ALJ's conclusion that CMS' demand projections do not appear to consider the presence of a wireline carrier in Pittsburgh. Moreover, CMS failed to explain how its estimated year five demand was allocated for years 1 through 4, or how it distributed its demand throughout its system.

22. Thus, we affirm the judge's conclusion that MCI provided a more reliable analysis of the extent and distribution of demand in the Pittsburgh MSA. MCI based its forecasts on interviews of households in the Pittsburgh area. It also conducted other surveys to gain additional qualitative insight into cellular demand. Unlike CMS, the underlying assumptions and methodology in MCI's demand surveys are clearly stated. The assumptions and forecasting methodology appear reasonable. We do not agree with CMS' contention that MCI's studies contained serious methodological errors. Clearly, any market demand study must contain certain assumptions which are not susceptible to proof in order to account

---

[13] A figure of .0060 per thousand population appears in CMS' Direct Case; it appears to be an error.

for all relevant factors. Our conclusion here is that based on the record in this proceeding, MCI's demand forecasts are more reliable than those of the other two applicants. In addition, MCI's demand projections considered a variety of factors—such as costs, population and industrial development, as well as other demographic changes, and the likely usage patterns of subscribers—which are likely to affect demand for cellular services. MCI defined its Pittsburgh CGSA in order to satisfy present and anticipated need for cellular service, excluding areas where negligible radiotelephone traffic demand was expected. The areas of negligible demand were determined on the basis of the Pittsburgh MSA demographic and geographic information, and analysis of the Public Need Survey and Selected Industry survey findings. Importantly, MCI also developed its engineering frequency and channelization plans for Pittsburgh based on the data collected from its demographic analysis, the Public Need Survey and Selected Industry Survey (considering the variables of population density, employment concentration and geographic areas of frequent cellular radiotelephone service usage by likely subscribers) (MCI Exs. 28 and 29). Accordingly, MCI will be preferred on this issue.

23. *Ability to Accommodate Demand for Local and Roamer Service.* MCI proposes a 14 cell system to cover the Pittsburgh MSA, with four cells to serve the city itself. The number of channels allocated for each cell was determined by apportioning the second year subscriber projection (2,200 subscribers) among the cells in the same proportion as the population served by that cell and allocating a sufficient number of channels at each site to provide a grade of service (GOS) of .02. MCI plans to monitor traffic load continuously in order to ensure that the GOS is maintained. Celcom proposes an 11 cell system (with two cells allocated to the city of Pittsburgh), phasing in the system from an initial 5 cell system. Celcom has forecast a four year channel requirement of 232 voice channels with a capacity designed to handle its forecast of 6,600 subscribers at a .05 Erlang B GOS. Celcom expects to have 96 channels and 2,100 subscribers by year two. CMS proposes a 16 cell system which is projected to be able to satisfy demand up to the fifth year of operation. CMS system design placed cells to provide multiple cell overlap, particularly in the downtown Pittsburgh area. CMS' channel plan (154 in the first year, 251 in the second year, 665 in the completed system) will accommodate the demand forecast for the system of 4,761 subscribers in year two. CMS' GOS objective is .01. CMS will monitor its system traffic constantly for the purpose of maintaining its design GOS. (*I.D.*, paras. 19–24).

24. The judge awarded MCI a preference on this issue because its proposal reflected an understanding of demand for service in the Pittsburgh MSA. *I.D.*, para. 59. The judge concluded that fundamental principles of cellular design indicate that the spacing between cells should follow as uniform a pattern as possible to achieve

optimal coverage with minimal intra-system co-channel interference. The judge further concluded that CMS concentrates its cells, resulting in a lack of uniform spacing between them, in the central Pittsburgh area, and plans to reuse channels at cells which are spaced no more than 20 miles apart. Therefore, the judge concluded that the record reflects serious potential co-channel interference problems in CMS' original proposal, and that the lack of uniformity in spacing requires that CMS sectorize the majority of its cells in a way that may well preclude the rapid and inexpensive reallocation of channels from lightly-used cells. The ALJ also concluded that CMS was not entitled to a preference for its "depth of coverage" (concentration of cells) and that CMS has designed a system which does not appear to be entirely consistent with the Commission's mandate to guarantee rapid implementation and expansion; rather CMS' system will require substantial amounts of retuning and reassessment as demand increases (*I.D.*, paras. 57–58).

25. CMS excepts to the ALJ's conclusion, arguing that there is no single fundamental principle for cellular design, as suggested by the judge, and that therefore its system was erroneously awarded a demerit.[14] CMS argues that its design (expansion cell approach) is superior because it will expand gracefully, will have better portable coverage and building penetration (depth of coverage) and will be more reliable.[15] It further maintains that its design will not result in intra-system interference.[16]

26. Celcom argues that its system is better than MCI's system because it proposes to use more channels (Celcom: 232 channels; MCI: 172 channels) which can accommodate more demand and because it plans to start service before MCI would initiate service. Celcom also argues that MCI's proposal suffers from the same excessive cell overlap as CMS' proposal.[17]

27. We agree with CMS that the judge's conclusions regarding its system design are erroneous, and we are reversing them. The record does not indicate that CMS' system design will significantly affect its ability to accommodate the expected demand. The judge specifically found that CMS would be able to accommodate its predicted first-year demand (*I.D.*, para. 56). Furthermore, there has not been any demonstration of record that CMS' system will be unable to

---

[14] CMS argues that this fact would have been demonstrated in this proceeding had the judge allowed surrebuttal evidence or cross examination. See para. 56, *infra*.

[15] According to CMS overlapping cell coverage provides a user with alternative signal paths for reception. For a discussion of CMS' depth of coverage proposal, see paragraph 42, *infra*.

[16] CMS claims that this error was partially the result of the judge's not accepting its proffered carrier-to-interference ratio (C/I) for determining intra-system interference. See para. 41, *infra*.

[17] MCI's application proposes overlapping cell design, but to a lesser degree than CMS. Celcom's allegation that it proposes to use more channels than MCI is misleading; Celcom's 232 channels are in year four, MCI's 172 in year two.

accommodate the increased demand in subsequent years. Thus, the discussion in paragraphs 57 and 58 of the *I.D.* about CMS' system design appears to be unnecessary to a conclusion regarding issue (a). We will discuss the questions of intra-system interference and system fine-tuning in connection with the expansion plan issue, below. *See* paras. 33–45, *infra*.

28. Nevertheless, the record continues to support a finding that MCI designed its system, distributed demand throughout the MSA, and determined its channel allocation plans based on its demand distribution forecasts (MCI Exs. 28, 29, App. Ex. 5 at 5–7). The evidence does not justify such a finding in the case of the other applicants (see paras. 21 and 22, *supra*; Celcom R. Ex. 19, p.6; CMS Exs. II and IV). Accordingly, MCI will be given a slight preference for the manner in which it proposes to accommodate local demand, rather than the preference awarded by the judge.

29. The judge awarded MCI a slight preference for its proposal to provide service to roamers (mobile units normally associated with another carrier). The judge preferred MCI because its roamer proposal is not linked to the creation of a hypothetical nationwide registration system, and because of its commitment to provide roamer service during the first year of operation in Pittsburgh regardless of the state of intersystem registration. (*I.D.* para. 60).

30. CMS and Celcom except to the judge's conclusion. CMS alleges that its roamer proposal is not tied to a nationwide system, and that its proposal provides greater efficiency because a foreign subscriber can be reached by dialing a single unchanging access number. Celcom contends that there is nothing in the record to support the judge's finding that Celcom will not offer roamer service from the commencement of commercial operations. It argues that it deserves a preference because it will offer roamer service to wireline subscribers, and because its offering of roamer service is not dependent on the establishment of a nationwide clearinghouse. Celcom further contends that the proposed differences in treatment of roamers are irrelevant to this issue, which is concerned with the ability to accommodate roamer traffic.

31. We will reverse the judge's award of a slight preference to MCI. We agree with Celcom that the applicants' treatment of roamers is irrelevant to this issue, and that no preferences should be awarded on this basis. The designated issue has to do with an applicant's ability to accommodate the demand for roamer services, not the method by which they are to be served. All of the applicants propose to provide service to roamers registered in their system. (*I.D.*, paras. 25, 26 and 27). The record also supports a finding that all of the applicants will be able to accommodate service to roamers in their systems. See para. 23, *supra*. Accordingly, there is no ground for a preference to any of the applicants on this issue.

32. To summarize, the judge awarded MCI a substantial prefer-

ence under issue (a), while we have modified her decision and awarded MCI a slight preference for its superior geographic area and population proposal, a preference for its analysis of the extent and distribution of demand for cellular service and a slight preference for the manner in which it proposes to accommodate local demand. As discussed above, our reduction of MCI's preference is based primarily on our finding that the other two applicants were unduly penalized under issue (a).

### *Issue (b)*

33. *Expansion plans.* This issue calls for a comparison of each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed CGSA in order to meet increasing demand. *In Cellular Communications Systems*, 86 FCC 2d at 503, we indicated that preference should be given to designs entailing efficient frequency use, including the applicant's plans with regard to cell splitting and additional channels, the degree of frequency reuse the system will be capable of, and the applicant's ability to coordinate the use of channels with adjacent or nearby cellular systems.

34. The judge awarded MCI a preference under this issue, concluding that MCI's expansion proposal is distinguishable from Celcom's because of its proposal for evaluating and monitoring system traffic congestion. The ALJ concluded that MCI's and Celcom's proposals demonstrate an understanding of cellular design principles and reflect *bona fide* cellular systems and expansion plans. The judge also concluded that neither proposal violates co-channel or adjacent channel reuse criteria and both have assigned their frequency sets in accordance with a standard 7-cell reuse pattern. CMS' system, according to the judge, would require significant fine-tuning before implementation of its expansion plans would be possible.

35. CMS excepts to the judge's findings and conclusions and asserts that it should receive a preference under this issue. According to CMS, its "expansion cell" approach is a more flexible means of expansion than MCI's or Celcom's. CMS contends that there is no evidence in the record to suggest that CMS' system would require significant fine-tuning before implementation of its expansion plan would be possible. It also excepts to the judge's findings that its system will suffer co-channel interference, arguing that the judge should not have rejected CMS' use of the carrier-to-interference ratio for evaluating intra-system interference. CMS' also excepts to the judge's finding that CMS frequency plan is designed for a highly sectorized system while its engineering parameter tables reflect an essentially omnidirectional system. In addition, CMS excepts to the judge's finding that in sectorizing its cells to accomplish frequency reuse, CMS will impermissibly have to reduce its 39 dBu contours to

cover less than 75% of its CGSA. Finally, CMS contends that the judge failed to compare the proposals in accordance with the factors incorporated in the designation order.

36. CMS will construct its first-year system with cells adequate to satisfy fifth-year market demand. In the first year, however, CMS will install only that equipment and distribute only those channels necessary to meet forecasted first year demand. (CMS Vol. I, Ex. IV; *I.D.*, para. 34). Frequencies will be assigned on a four-cell reuse pattern. For the first five years, expansion of system capacity will occur by the addition of channels at the cell sites. CMS proposes an initial GOS of .01. For the fourth and fifth years CMS calculated its channel requirements based upon a .05 GOS. (CMS Ex. IV p. 12). When the GOS is .05 or more for any cell on 21 of the preceeding 30 days, the system will be analyzed to determine what action is necessary to improve GOS. (CMS Ex. III p. 16).

37. Celcom excepts to the judge's grant of a preference to MCI, stating that MCI's filing was silent on how much congestion it will tolerate before adding capacity to meet increasing demand. It excepts to the judge's finding that Celcom is likely to experience degradation of service as it expands its system (*I.D.*, para. 32) and to the finding that the frequency plan does not follow the standard 7-cell plan that Celcom proposes to use (*I.D.*, para. 33). Celcom also excepts to the finding that its fourth year cell structure would have to be sectorized at an earlier stage to minimize adjacent channel interference (*I.D.*, para. 33). Celcom objects to the judge's failure to award preferences to applicants' proposals which incorporated a high degree of flexibility, permitting their plans to be easily adapted to meet the particular needs of the MSA.

38. Celcom plans to phase in its 11 cell system and will construct at least five of its cells during the first year of operation (Celcom Ex. 5). The order of constructing the remaining cells will depend upon demand indications from the central switch. Some channel borrowing may occur during the initial stage. Once all of its cells are constructed, Celcom's system will accommodate projected demand through year four. Celcom gives no step-by-step expansion plan, except to note that expansion beyond the initial stage will be accomplished through frequency reuse and cell splitting. Celcom also states that decisions concerning congestion will be made on a case-by-case basis. Celcom provided a fourth-year channel assignment plan, divided on a per-cell basis. Celcom will establish a procedure to assure that anticipatory or corrective action will be taken promptly in the event that service quality begins to fall below .05 GOS. Celcom intends to take action when the blocking rate at the cell reaches 5% on any four days in a 20 day period. (*I.D.*, para. 32).

39. MCI will construct its initial system with cell sites and channels sufficient to accomodate projected demand through the second year of operation (172 voice channels) (MCI Ex. 5–7). Beyond

the second year of operation, in lieu of specific channel plans, MCI has adopted a five-step plan for system expansion: first, addition of channels within the baseline allocation; second, addition of channels outside the baseline allocation; third, addition of sites; fourth, conversion from omnidirectional to sector antennas; fifth, cell splitting (*I.D.*, para. 28). Prior to sectorization MCI's cells will be laid out in a seven-cell pattern. MCI will continuously monitor traffic loading to determine GOS during peak hours for each site and will incrementally increase site capacity in order to maintain the GOS (*I.D.*, para. 31).

40. We agree with both Celcom and CMS that a number of the judge's findings and conclusion with respect to Issue (b) are erroneous and must be corrected. We reject the *I.D.*'s implication (at para. 63) that CMS has not presented a *bona fide* cellular design. All of the applicants have presented *bona fide* cellular designs. We emphasize that we do not favor one system design over another. We disagree with the ALJ's holding that there is a "fundamental principle of cellular design that spacing between cells should follow as uniform a pattern as possible to achieve optimal coverage with minimal intra-system co-channel interference" (*I.D.*, para. 57 and n. 13). We recognize that the use of a regular polygonal (generally hexagonal) grid in cellular system planning is viewed as "help[ing] to systematize the design and layout of cellular systems."[18] That does not mean that a uniformly spaced pattern is a fundamental design requirement, however.[19] A cellular system not based on a uniform grid may require some fine-tuning in the course of expansion,[20] but any cellular system will require a degree of adjustment, in response to unexpected propagation effects or usage patterns.[21] In adopting its cellular rules and policies, the Commission sought to avoid imposing any rigid system design concepts, in order to permit applicants the flexibility (within certain parameters) to design their systems in different ways. 86 FCC 2d at 505–509. CMS' design concept, while different from that utilized by other applicants, appears to be viable and consistent with our general requirements for system design. We will not penalize CMS merely because it chooses not to follow the conventional wisdom. Nor will CMS' system be disfavored because it may require more fine-tuning than other systems before implementation of its expansion plans would be possible (*I.D.*, para. 63).

41. We also reverse the ALJ's conclusions that CMS' initial

---

[18] V.H. MacDonald, *The Cellular Concept*, 58 Bell Sys. Tech. J. 15, 19–20 (1979).

[19] MacDonald states: "In principle, the spacing of transmitter sites does not need to be regular, and the cells do not need to have any particular shape." *Id.* at 16.

[20] *Id.* at 19.

[21] *Id.* at 20, 22; Advanced Mobile Phone Service, Developmental System Report No. 9 at AII-5 to AII-7 (filed May 29, 1979). Furthermore, a system designed on an idealized grid will likely be modified during construction, as ideally located transmitter sites will often be unavailable.

system shows a serious potential for co-channel interference and that the lack of uniformity in spacing requires that CMS sectorize the majority of its cells in a way that may well preclude the rapid and inexpensive reallocation of channels from lightly used cells. With respect to co-channel interference, there is no record evidence to support the ALJ's conclusions. The record does not indicate that CMS' initial configuration will suffer from intra-system interference (CMS Dir. Case Exs. III, IV, and IV (a)). With respect to intra-system interference that may occur in later years, as CMS adds channels and splits cells, we do not believe that any comparative demerit is warranted. Some degree of intra-system interference is to be expected in any maturing cellular system.[22] The effects of such interference can be managed effectively, because all of the potentially interfering transmitters are under the control of the same carrier. Most importantly, CMS' proposal would not prevent CMS from implementing its system, nor would it result in interference to any other system.[23] We also vacate as unsupported by the record the judge's finding that if CMS were to reduce cell radii to satisfy the criteria for frequency reuse, the result would be a drastic reduction in CMS' coverage of its CGSA.

42. On the other hand, we reject CMS' argument that its system design is, in fact, superior to that of Celcom or MCI. CMS has not demonstrated that building penetration and service to portables in Pittsburgh would be inadequate without its proposed depth of coverage. Accordingly, its proposal might be viewed simply as different from, not better than, the others.

43. The judge's finding at para. 33 that Celcom's adjacent channels in cells 5 and 7 will result in an increased probability of channel interference will be reversed for the same reasons as our reversal of a finding of co-channel interference in CMS' system. We will not consider intra-system interference to be decisionally significant, whether co-channel or adjacent channel, because the system operator has the ability to adjust the operating parameters of its system. In addition, the judge's findings that Celcom's frequency set

---

[22] As we note in our companion Chicago decision, Rogers Radiocall, Inc., FCC 84–62, CC Docket 82–721, adopted February 24, 1984, a small-cell system is characterized as "interference-limited," because the effective coverage of a transmitter is limited by the existence of co-channel interference from other transmitter locations. *Id.* at n. 35.

[23] As we state in our companion Decision in the Chicago case, *supra* note 37, the "Carey Report" on which the judge relies to find intra-system interference, was adopted as the Commission's interim standard for determining reliable service areas and inter-system interference standard pending the development of more definite propagation models. We will not base intra-system interference determinations on Carey, however, because actual propagation effects can be expected to vary substantially from the theoretical Carey predictions. *See Id.* at n. . The carrier to interference ratio may properly be used by a cellular system operator for managing the effects of intra-system interference.

assignments do not follow the 7-cell plan it proposed (*I.D.*, para. 33) and that Celcom will be unable to meet its GOS objective by year 4 (*I.D.*, para. 32 and n. 10), are vacated as unsupported by the record (Celcom Exs 4, 6, R. Ex. 21).

44. Having found CMS' proposal inferior, the sole basis for the judge's award of a preference to MCI over Celcom under this issue was MCI's proposal for evaluating and monitoring system traffic congestion (*I.D.* para. 64). The record indicates, however, that all of the applicants propose to monitor traffic continuously (Celcom Ex. 6, CMS Vol. I, Ex. IV, MCI Ex. 5). Celcom specified that it would add capacity whenever service in a single cell experienced a peak-hour blockage rate exceeding 5 percent for four days out of 20. CMS stated than when .05 GOS is equaled or exceeded for any cell on 21 of the preceeding 30 days, the system will be analyzed for expansion of capacity. The judge concluded that CMS and Celcom will allow significant congestion to occur before taking corrective action. We do not agree with the judge that MCI will anticipate system congestion rather than waiting until demand reaches or exceeds design levels for specified periods of time. MCI stated that it would expand when certain "expansion capacity thresholds" are exceeded (MCI App. Ex 6). However, these "expansion capacity thresholds" are nowhere explained in MCI's application or direct case. Therefore, a finding cannot be made as to whether MCI's proposal is better or worse than those of the other two applicants. The judge's conclusion in this regard is reversed. Therefore, a preference will not be given to any of the applicants for these proposals.

45. In view of our findings stated above, we conclude that all of the applicants have set forth adequate expansion proposals. While CMS provided a slightly more detailed expansion proposal, we agree with the judge's conclusion at para. 63 that, the other applicants' proposals appear to provide more flexibility than CMS'. However, none of the expansion proposals is set forth in sufficient detail to warrant a preference. Moreover, the record does not establish that any single applicant's expansion plan will be able to accommodate the expected growth in demand for service while the others will not. Therefore, we conclude that no preferences will be accorded under this issue.

### *Issue (c)*

46. This issue calls for a comparison of the nature and extent of the service proposed by each applicant, including the rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities). In *Cellular Communications Systems*, we indicated that this issue is not as significant as issues (a) and (b). 86 FCC 2d at 503. We also stated that while adequacy of base station and switching facilities might be an issue in some cases, we did not expect it to be a significant issue in general.

Finally, we noted that personnel and practices would be significant to the extent that they affect an applicant's ability to implement its proposal. Judge Ehrig gave CMS a preference for its proposed rates and charges but did not award any preference for the other elements of this issue. We affirm, although we find the preference to be only slight.

47. *Proposed Service Offerings*. The *I.D.* is ambiguous on this issue in that at para. 67 the judge stated "CMS is entitled to a comparative preference for its proposed service offerings and rates and charges"; however, the *I.D.* included conclusions regarding rates and charges but not service offerings. CMS excepts to what it believes to be the judge's failure to compare the applicants on the basis of their service offerings and contends it deserves a preference for its superior service offerings.

48. We have reviewed the judge's findings of fact at paras. 38–41, and we find that all of the applicants propose to offer a variety of services in addition to basic service. While CMS proposes to offer a few more services than MCI and substantially many more than Celcom, no credit will be given because CMS did not establish that there is any potential demand for these services. We therefore conclude that no preferences will be awarded under this issue for service features.

49. *Rates and Charges*. The judge gave CMS a preference for its rate structure but not for its rate levels. The judge concluded that CMS' rate structure will best enhance development and use of cellular resources. CMS' usage charge will encourage efficiency during off-peak hours based on price differentials and small billing increments (one-half minute initially and six seconds thereafter) for each call. CMS also proposes to offer data services to utilize capacity available off-peak. (*I.D.*, paras. 67–70).

50. All of the applicants except to the judge's conclusion not to award comparative credit for rate levels. MCI also contends that CMS should not have been awarded a preference for its rate structure because its design would cause undue customer confusion. MCI contends further that CMS' proposal to offer data transmission pricing should not have been given credit because the rate structure will not encourage off-peak use, and that CMS' proposal to pass through telephone charges is unjust and unreasonable.[24] Celcom excepts to the judge's conclusion that its proposal to bundle 100 minutes of usage with the monthly service charge is inefficient. In addition, Celcom alleges that its proposal is better than MCI's because MCI's proposal to integrate certain portions of the cellular operation into MCI's other communications ventures in Pittsburgh

---

[24] CMS will charge the customer for air time and landline telephone connections separately, thereby passing the charges for the landline portion of the call through to the subscriber.

will result in neglect of the cellular operation and raises competitive and legal risks associated with MCI's vertical integration.

51. We agree with the judge that CMS' rate structure is to be preferred to MCI's and Celcom's. CMS' unbundled rate structure, which employs a much shorter billing increment, better serves to promote usage-sensitive cost-based pricing.[25] All of the applicants' rate structures will encourage off-peak usage, which ensures efficient use of system capacity.[26] However, we also agree with the judge that CMS' proposal to offer data service to utilize idle capacity in the system (at any time of the day) goes even further toward encouraging efficient use of the spectrum. Therefore, a slight preference is warranted.[27]

52. We agree with the judge's conclusion not to award a preference based on rate levels. The judge found that none of the parties adequately describes the methodology used to arrive at its proposed rates. The judge's finding is supported by the record. As the Review Board concluded in *Houston Mobilfone*, an applicant's proposed rates may be of decisional significance "where an applicant has made an appropriate showing of the methodology used in the effectuation of its rate proposal". *Houston Mobilfone, Inc.*, 65 FCC 2d at 859. Without such a showing, an applicant's proposal is completely unrealistic. An applicant's proposed rates and charges are always subject to a degree of uncertainty. Because common carrier mobile services, such as cellular service, have been considered essentially intrastate, the matter of rates and charges to the public has been left to the states to regulate. *Houston Mobilfone, Inc.*, 65 FCC 2d at 859. Thus, even when an applicant has established its methodology (including the assumptions upon which it has based its expected costs) for establishing its rates, its rates are still suspect because the state utility commission may adjust them. Nevertheless, where an applicant's proposed rates and charges are based upon an established methodology that reasonably anticipates all the applicant's costs, we will consider an applicant's proposed rates. In all other instances,

---

[25] *See, e.g.*, MTS and WATS Market Structure (Access Charge Order), Order on Reconsideration, FCC 83–356, 48 Fed. Reg. 42984 (September 21, 1983), at para. 7. We find no basis for MCI's argument that CMS' proposal to pass through telephone charges is unjust and unreasonable and will result in confusion to the customer. Moreover, MCI has not established that its own proposal to avoid passing through these charges would be more efficient.

[26] *See, e.g.*, AT&T (WATS), 84 FCC 2d 158, 174–78, (1980); AT&T (WATS), 86 FCC 2d 820, 830–54 (1981).

[27] Celcom's allegations concerning MCI's "vertical integration" are unpersuasive and unsupported by the record. Celcom has not established that MCI possess market power or that MCI will be in a position to engage in anticompetitive activity because of its status as an intercity communications common carrier.

such proposed rates are too unrealistic to warrant our consideration.[28] Accordingly, we affirm the judge's refusal to grant comparative credit for the proposed rate levels.[29]

53. *Practices.* CMS excepts to the judge's failure to consider the comparative significance of CMS' plans for fostering minority and female communications enterprises. CMS' parent (Graphic) has agreed to invest $100,000 to fund the creation of at least three local minority and/or female controlled organizations in Pittsburgh to engage in retail and service functions with respect to marketing CMS' cellular services. (CMS Dir. Case Ex. VII, p. 6). Because the judge omitted mention of CMS' proposal, we have examined it on review. CMS' proposal, while commendable, does not involve participation by minorities or women in the ownership or operation of the cellular carrier itself. Accordingly, no preference can be considered on the basis of the personnel or practices issues designated for comparative hearing.[30]

### *Procedural Matters*

54. Celcom asserts that the hearing was conducted in such a manner as to deprive the applicants of an equitable and meaningful hearing, as required by *Ashbacker Radio Corp v. FCC*, 326 U.S. 327 (1945), the Administrative Procedure Act and Sections 309 and 409 of the Communications Act, in that the judge did not allow discovery or cross-examination. Celcom argues that this tended to frustrate the development of a record that would permit selection of the best

---

[28] In this regard, we note that we have considered the applicants' rate structures because those proposals are not based upon an unknown methodology or unavailable cost data. Indeed, the Commission is very familiar with the concepts the applicants utilized in establishing their rate structures. Additionally, unlike rates themselves, rate structures can be proposed and considered without reference to the applicant's actual underlying expenses.

[29] CMS also contends that in this instance the judge should not have applied *Houston Mobilfone.* Citing *Telanserphone Inc.* v. *FCC*, 231 F.2d 732 (D.C. Cir. 1956), as support, CMS argues that because of the newness of cellular and because the matter of rates and charges was designated for comparative hearing, we are required to consider rate levels. However, as the Review Board noted in *Houston Mobilfone*, that case was decided at a time when relatively few states exercised jurisdiction over such rates and charges, and the primary responsibility for rate regulation fell upon this Commission. Furthermore, as we indicated above, we are willing to consider an applicant's proposed rates when the appropriate information is supplied.

[30] The Common Carrier Bureau has declined to grant a preference on the basis of minority participation in cellular services. GTE Mobilnet of Tampa, Inc. (Tampa Order), 54 RR 2d 829, 833 at n. 8, released August 10, 1983. An application for review of the Bureau's action is pending before the Commission. Our decision in that proceeding will have no bearing on the instant proceeding because here there is no proposed minority participation in the licensee itself. CMS has also proposed to give a seat on its board of directors to a "consumer representative." CMS has suggested no reason why the judge's decision not to grant a preference for this proposal should be reversed. Therefore, no preference will be awarded.

application. Celcom argues that discovery of the back-up materials involving expert witness testimony concerning demand studies and technical materials was needed in order to determine the accuracy and relevance of the studies; and that the judge erred in denying Celcom's request to cross-examine three MCI witnesses to explore the extent of MCI's vertical integration.

55. The procedures used were fully consistent with our expedited hearing procedures, 89 FCC 2d at 90–94, the Administrative Procedure Act, Section 309 of the Communications Act and the requirements of due process. When we adopted those procedures, we explicitly left it to the judges to decide whether cross-examination was required to assure an adequate record. Celcom has not shown that the issue on which cross-examination was denied was decisionally significant, and, as is apparent from our discussion in this decision, the case does not turn on the issue on which Celcom sought oral cross-examination. *See* 86 FCC 2d at 491–501, *aff'd recon.* 89 FCC 2d at 93–94.

56. CMS has filed a motion to reopen the record, seeking an opportunity to rebut certain conclusions in the *I.D.* that it says were based on evidence first submitted on rebuttal. CMS also wishes to address certain issues first raised in the *I.D.* These matters include (a) the conclusion that CMS would suffer undue intra-system interference that would be detrimental to its ability to accommodate demand initially and as the system expands; and (b) the finding that a fundamental principle of cellular design requires that spacing between cells follow as uniform a pattern as possible. With regard to each of these issues we have either overruled the judge or held that, in fairness to CMS, her findings would be accorded no weight. Any prejudice that CMS might have suffered as a result of these rulings has therefore been removed. Accordingly, the motion to reopen the record will be denied.

57. Celcom has suggested, in a post-argument memorandum, that the Commission may select a licensee by lottery in the event it is unable to find significant differences among the applicants. *See* note 4, *supra*. We agree that we could use a "tiebreaker" lottery under the public interest standard of Section 309 of the Communications Act and under the precepts of the Administrative Procedure Act. We also believe that administrative law judges have discretion to certify to us that two or more applicants are "tied" and that the ultimate choice should be made randomly. In this case it is clear that any of the applicants is qualified to construct and operate a cellular system to serve Pittsburgh. While there are not wide differences in the quality of the applicants, the record shows that there are material distinctions between the applicants under our comparative criteria established in *Cellular Systems*, *supra*, and we therefore select MCI.

### *Conclusions*

58. Based on our review of the record in this case we have concluded that MCI deserves a slight preference overall under Issue (a), based on a slight preference for its superior coverage of area and population; a preference for its analysis of the extent and distribution of demand; and a slight preference for the manner in which it proposes to accommodate local demand. CMS received a slight preference under Issue (c) for its rate structure. The slight preference awarded to MCI under issue (a) outweighs CMS' slight preference under issue (c). We conclude that on a comparative basis MCI's application is superior to both Celcom's and CMS' and that the public interest, convenience and necessity will be better served by the grant of MCI's application. Therefore, the *I.D.* is affirmed, as modified herein.

59. Accordingly, IT IS ORDERED, that the application of MCI Cellular Telephone Company, File No. 26111-CL-P-(14)-82 IS GRANTED[31] and the applications of Celcom Communications Corporation of Pittsburgh, File No. 26157-CL-P-(11)-82 and Cellular Mobile Systems of Pennsylvania, Inc., File No. 26184-CL-P-(16)-82 ARE DENIED.

60. IT IS FURTHER ORDERED, that the Motion to Reopen the Record filed by Cellular Mobile Systems of Pennsylvania, Inc., IS DENIED.

61. IT IS FURTHER ORDERED, that the Motion for Leave to File Supplemental Memorandum Concerning Recently Decided Authority and Procedure filed by Celcom Communications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

---

[31] This grant is conditioned upon the permittee's obtaining the appropriate antenna structure clearances. The authorization does not include any right to interference protection in any areas outside the Pittsburgh MSA, and is further conditioned upon MCI Cellular Telephone Company coordinating with future licensees of the Lawrence, Butler, Armstrong, Indiana and Fayette Counties and upon providing interference-free operation in these areas. See Cellular Mobile Systems of Indiana, Inc. (Indianapolis Order), 93 FCC 2d 26, 29 n. 4 (1983).

February 24, 1984

## CONCURRING STATEMENT
## of
## FCC COMMISSIONER JAMES H. QUELLO

In re: Exceptions to the Initial Decision of Chief Administrative Law Judge Lenore G. Ehrig in *MCI Cellular Telephone Co. (Pittsburgh Cellular Proceeding)*, CC Docket No. 82-796; and

Exceptions to the Initial Decision of Acting Chief Administrative Law Judge Thomas B. Fitzpatrick in *Rogers Radiocall, Inc. (Chicago Cellular Proceeding)*, CC Docket No. 82-721.

In both of these cases, I believe that the Commission has correctly affirmed the Initial Decisions of Chief Judge Ehrig and Acting Chief Judge Fitzpatrick. The judges found distinctions among the applicants which, in my opinion, fully justified their conclusions.

It has never been claimed that the comparative process is able to determine with absolute clarity that one applicant will better serve the public interest than another applicant. The process must rely upon the more modest assertion that the Commission, after considering the comparative qualifications of the applicants, can make a reasoned judgment that better service is *likely* to follow the selection of one applicant over another. Greater precision in foretelling future events is neither expected nor required.

The orders assert that the comparative process significantly delays service to the public which is to suggest that alternatives are available which would avoid such delays without damage to the public interest. The orders assert: "... we believe that the inherent flexibility of the cellular concept would allow *any* of the applicants to reconfigure its system in order to meet the requirements of the marketplace." (Emphasis added.) They further assert that "... any of the applicants is capable of providing cellular service to the public." And, they reach the unsupported conclusion that system design is not a valid consideration in the comparative process.

Thus, while selecting two applicants based upon comparisons, the Commission seems bent on denigrating the comparative process. By modifying the Initial Decisions to minimize or eliminate differences among applicants, the Commission is adding to whatever infirmities the process now bears. While ostensibly attempting to fashion an expedited comparative process to speed service to the public, the Commission appears to be undermining its own objective by casting doubt as to the efficacy of that same process.

The comparative process is certainly not without fault. It is often time-consuming, wasteful, contentious, mechanical and, at times, exasperating. Still, it is a time-tested mechanism whereby the Commission bestows valuable privileges among competitors. Unless and until the Commission has at hand an alternative which not only avoids the faults of the process but, also, approximates its virtues, I would urge caution and restraint. It might be that we are chopping the bottom out of the only boat capable of carrying the burden of deciding these controversies so central to the Commission's mandate.

While I cannot support many of the conclusions reached in these orders, I do support affirmation of the Initial Decisions. Therefore, I concur.

re: Pittsburgh and Chicago
Cellular Proceedings
(CC Dockets 82-721
and 82-796)

## SEPARATE STATEMENT OF COMMISSIONER MIMI WEYFORTH DAWSON

While I will concur with the decisions reached in these cases, I believe that it should be emphasized, as the Pittsburgh decision makes clear, that Administrative Law Judges have the discretion to find two or more applicants in cellular proceedings to be "tied" thus subject to a "tie-breaker" lottery. *MCI Cellular Telephone Co.*, sl. op. at ¶ 57. I do not believe that ALJs or the Commission should base decisions on factual distinctions which are insignificant. As the Commission has found, mere factual distinctions among applicants may not warrant preferences or demerits in comparative hearings. *See, e.g., Alexander S. Klein*, 86 F.C.C.2d 423, 429 (1981).

FCC 83D-43

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | CC Docket No. 82-796 |
| MCI CELLULAR TELEPHONE COMPANY | File No. 26111-CL-P-(14)-82 |
| CELCOM COMMUNICATIONS CORPORATION OF PITTSBURGH | File No. 26157-CL-P-(11)-82 |
| CELLULAR MOBILE SYSTEMS OF PENNSYLVANIA, INC. | File No. 26184-CL-P-(16)-82 |
| For a Construction Permit to establish a new cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Pittsburgh, Pennsylvania, modified Standard Metropolitan Statistical Area | |

### *Appearances*

*Ruth S. Baker-Batiste, N.E. Johnson, John Pelkey* and *Melody A. Virtue* on behalf of MCI Cellular Telephone Company; *S. William Livingston* and *Thomas William May* on behalf of Celcom Communications Corporation of Pittsburgh; *Edward P. Taptich, Lawrence Movshin* and *Patrick Whittle* on behalf of Cellular Mobile Systems of Pennsylvania, Inc.; and *James O. Juntilla* and *Robert W. Spangler* on behalf of the Separated Trial Staff, Common Carrier Bureau, Federal Communications Commission.

## INITIAL DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE LENORE G. EHRIG

(Issued: July 26, 1983; Released: July 29, 1983)

### *Preliminary Statement*

1. This proceeding involves the mutually exclusive applications of MCI Cellular Telephone Company (MCI), Celcom Communications Corporation of Pittsburgh (Celcom), and Cellular Mobile Systems of Pennsylvania, Inc. (CMS) for authority to construct and operate a new cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the

Pittsburgh, Pennsylvania Standard Metropolitan Statistical Area (SMSA).

2. By *Memorandum Opinion and Order*, 47 Fed. Reg. 55724, published December 13, 1982, the Chief, Common Carrier Bureau, acting pursuant to delegated authority, designated the applications for hearing on the following issues:

(a) To determine on a comparative basis the geographic area and population that each applicant proposes to serve; to determine and compare the relative demand for the services proposed in said areas; and to determine and compare the ability of each applicant's cellular system to accommodate the anticipated demand for both local and roamer service;

(b) To determine on a comparative basis each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed CGSA[1] in order to meet anticipated increasing demand for local and roamer service;

(c) To determine on a comparative basis the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities); and

(d) To determine, in light of the evidence adduced under the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience and necessity.

3. Pursuant to the expedited hearing procedures governing evaluation of cellular radio applications in the top thirty modified standard metropolitan statistical areas (SMSAs), 47 CFR 22.916(b)(1), the applicants filed their direct cases with their applications on June 7, 1982. Subsequent to the release of the December 1982 *Designation Order*, rebuttal testimony was filed on January 27, 1983 and supplemental direct case testimony was filed on April 11, 1983. A hearing session was held on April 19, 1983 at which time the Presiding Judge ruled on objections, admitted relevant exhibits into evidence, and ruled on requests for cross-examination. The record was closed on this same date. Proposed Findings of Fact and Conclusions of Law were filed by the parties and the Separated Trial Staff, Common Carrier Bureau (Trial Staff) on May 25, 1983. Replies were filed on June 7, 1983.

### *Findings of Fact*

4. *The Applicants*. MCI is a wholly-owned subsidiary of MCI Communications Corporation which, among other activities and through various subsidiaries, owns and operates a network of domestic point-to-point microwave relay stations for inter-city transmission of voice and data (MCI App. Ex. 10, p. 10–1).[2]

---

[1] Cellular Geographical Service Area.

[2] References to the record in this proceeding are as follows:

All references to direct case testimony are identified by sponsor and exhibit

5. Celcom is a wholly owned subsidiary of Associated Communications Corporation. Associated, both directly and through various subsidiaries, is a Commission broadcast licensee and applicant for authorization in the Domestic Public Land Mobile Radio Service (Celcom App. Ex. 1, 2).

6. CMS is a wholly owned subsidiary of Cellular Mobile Systems, Inc., which in turn is wholly owned by Graphic Scanning Corporation. Graphic Scanning directly and through subsidiaries provides specialized data and message processing and communications services (CMS Ex. 1, pp. 1–7).

### *Issue (a)*

7. *Geographic Area and Population.* The modified Pittsburgh, Pennsylvania SMSA consists of four counties—Allegheny, Beaver, Washington and Westmoreland—with a total area of 3,054 square miles including only dry land and land temporarily or partically covered by water. The 1980 census for the SMSA is 2,263,894.[3] Using a 100 foot minimum elevation to determine the 39 dBu contours,[4] MCI proposes to cover 84.6 percent of the geographic area of the

---

number. For example: CMS Vol. 1, Ex. II; MCI Ex. 2; Celcom Ex. 2. References to Proposed Findings are identified as, for example, MCI P.F., p. 1. References to rebuttal testimony are identified as, for example, MCI R. Ex. 2. References to the relevant applications are identified as, for example, MCI App. Ex. 1, p. 1.

By *Order Prior to First Hearing Session* (FCC 82M-4023), released December 17, 1982, the parties in this proceeding were directed to file a report supplying information concerning areas and populations of their proposed CGSAs. References to these reports are identified as, for example, MCI Report., p. 1.

By *Order* (FCC 83M-953), released March 22, 1983, the parties were ordered to file Supplements to their then-proffered direct cases describing their proposals with respect to their first year and expansion plans. References to these Supplements are identified as, for example, MCI S. 1, p. 1.

[3] *See*, U. S. Department of Commerce, Bureau of the Census, 1980 Census of Population, Vol. 1, Chapter A, Part 40 (PC80–1-A40), pp. 40–8, 40–50; and U.S. Bureau of the Census, *State and Metropolitan Area Data Book, 1982; A Statistical Abstract Supplement*, Table A, p. 222.

[4] *See*, 47 CFR 22.504(b), where a 100 foot minimum elevation value is the standard used by the Commission. Propogation charts are not given for elevations below 100 feet. It is noted, however, that MCI's rebuttal witness Schrenk (MCI R. Ex. 1, p. 4) calculated coverage for each applicant using two methods. The first method assumed a minimum elevation value of 100 feet. The second method assumed a minimum elevation value of 25 feet, which Schrenk contends is more realistic given the quantity and magnitude of radials with reduction center elevation below 100 feet. Reliance on the data based on a 25 foot minimum elevation does not change the result reached by calculating with 100 feet, but only increases the differences between the areas served by MCI and CMS. MCI also notes that, using 25 foot elevation data, there appears to be a small interior gap in the coverage area proposed by Celcom (MCI R. Ex. Attach. G). Both MCI rebuttal witness Schrenk and CMS rebuttal witness Wells (who apparently also used a 100 foot minimum value) estimated the percentage of SMSA covered by the respective 39 dBu contours as follows: (MCI R. Ex. 1, pp. 10–11; CMS R. Ex. 1, p. 2):

Pittsburgh SMSA; Celcom proposes to cover 70.4 percent; and CMS will cover 79.3 percent (MCI Ex. 27; MCI R. Ex. 1, pp. 10–11; CMS R. Ex. 1, p. 2). The composite 39 dBu contours of MCI's cellular system cover 2,610 square miles and approximately 2,195,146 people, or 96.96 percent of the total Pittsburgh SMSA population (MCI Ex. 27, p. 1). Celcom's system will cover 2,197 square miles and approximately 2,101,315 people (92.8 percent) (Celcom R. Ex. 14, p. 2). The 39 dBu contours of CMS' cellular system cover 2,324 square miles and encompass 2,136,847 people or 94.4 percent of the Pittsburgh SMSA population (CMS Ex. IV; CMS Report, p. 3).

8. None of the applicants proposes to serve the entire Pittsburgh SMSA. MCI's proposed system fails to provide coverage to portions of southwest Westmoreland County along and including a 10–15 mile section of Interstate I-70 (MCI R. Ex. 2, pp. 11, 12, 17). Celcom's coverage excludes two outlying areas: (1) Beaver County, north of New Brighton; and (2) in Washington County, from Lagonda to the south boundary and west to the intersection of Routes 331 and 231 (MCI R. Ex. 2, pp. 7, 17). CMS' proposed coverage excludes: (1) the northwest corner of Beaver County; (2) a section at the boundary between Washington and Beaver County; and (3) in Washington County, southwest of Interstate 70 and Route 221 (MCI R. Ex. 2, pp. 12, 17).

9. *Relative Demand for Service*. Each of the applicants conducted studies to determine relative demand for cellular radio service in the Pittsburgh SMSA. Based on their research, the applicants forecast demand[5] for cellular service as follows: (MCI Ex. 29, p. 3; CMS Ex. IV, p. 13; Celcom Ex. 5, App. A; Celcom R. Ex. 19, p. 6):

| *Year of Operation* | *Celcom* | *MCI* | *CMS* |
|---|---|---|---|
| Year 1 | 500 | 1,000 | 2,049 |
| Year 2 | 2,100 | 2,200 | 4,761 |
| Year 3 | 4,200 | 3,500 | 8,158 |
| Year 4 | 6,600 | 5,100 | 10,877 |
| Year 5 | No forecast | 6,800 | 13,584 |

10. MCI's demand forecast is based on three separate studies commissioned by the applicant: a public need survey, a selected industry survey, and focus groups (MCI Ex. 28, p. 3). In addition, MCI relied on a demographic analysis of Pittsburgh conducted by SRI International, an independent consulting firm (MCI Vo. 3, App. 3, Sec. IV). MCI's public need survey was also designed by SRI, but was conducted by Chilton Research Services. This survey was designed to

---

|  | *MCI 100 Ft. Method* | *MCI 25 Ft. Method* | *CMS 100 Ft. Method* |
|---|---|---|---|
| MCI | 84.6% | 84.5% | 84.8% |
| CMS | 79.3% | 77.5% | 78.6% |
| Celcom | 70.4% | 69.7% | 70.9% |

[5] Number of subscribers.

reach a representative sample of potential subscribers and to determine the general interest in cellular service, the expressed intent of the respondent to subscribe at various price levels, likely usage patterns, desired service enhancements, and to create a profile of like subscribers (MCI Vol. 3, App. 3, pp. 1–3). The survey was conducted by telephone and consisted of the presentation of a questionnaire to a sample of 796 respondents in the Pittsburgh SMSA (MCI Vol. 3, Sec. III-3). The sample group was selected by random digit dialing from households with incomes of at least $20,000 within each cooperating household. A screening question was used to determine if the household income was $20,000 or more (MCI Vol. 3, App. 3, p. A-5). A response rate of 57% was obtained (MCI R. Ex. 3, p. 23). Eligible respondents were asked to state the likelihood (definitely subscribe, probably subscribe, probably not subscribe, definitely not subscribe, don't know) for each of three cost levels for cellular service and equipment ($175, $125 and $75) that "you or your firm would subscribe to the service for your use" (MCI Vol. 3, App. 3; App. A of App. 3, p. A-54; and MCI Ex. 28, pp. 28–6 and 28–7). SRI collected data for each of the three price alternatives. However, MCI focused on the $125 alternative based on the assumption that a cellular user would typically incur a monthly charge of $125 (for both service and leased unit). MCI applied an Intent Translation Scale to derive the realized demand from the gross potential demand for cellular service (MCI Ex. 28, p. 14). Thus, MCI reduced the intensity of interest proportions gleaned from the SRI study by a variable which takes into consideration MCI's assumption that respondents in surveys of this type will indicate a greater willingness to subscribe than will be found in practice. In making its subscriber forecast, MCI considered such factors as elasticity of demand, changes in price of service and equipment over time, the introduction of new features and service capabilities, the impact of distributors, dealers and resellers, changes in customer usage patterns and preferences, evolving traffic patterns, pent-up and latent demand and population and industrial development and other demographic changes (MCI Ex. 29, p. 2).

11. MCI's selected industry survey was a telephone survey of 100 businesses in the Pittsburgh SMSA (MCI Vol. 3, App. 3, pp. B-3 to B-8). Companies interviewed were chosen from five industry sectors that are expected to have a need for cellular service. The purpose of the survey was to gain qualitative insight into the attitudes toward cellular service of likely business subscribers. Specifically, the survey elicited information regarding the level of interest in cellular service, sensitivity to price, likely usage patterns and characteristics of likely user companies. The survey did not affect MCI's estimation of realizable demand of its forecast of potential subscribers (MCI Vol. 3, App. 3, pp. B-3 to B-4).

12. Finally, MCI also commissioned Lieber Attitude Research,

Inc. to conduct a series of "focus group" sessions to study the attitudes and needs of potential subscribers. Focus interviewing is described as a qualitative research technique which concentrates on identifying the attitudes and motivations behind consumer behavior by conducting in-person, open-ended group discussion with selected individuals (MCI Vol. 3, App. 2, pp. 1–4). Like the selected industry study, the focus group sessions (none of which were conducted in Pittsburgh) were designed to yield qualitative results only, and did not affect MCI's statistically expressed estimates of realizable demand or potential subscribers (MCI Vol. 3, App. 2, p. 2). The focus group study investigated interest in cellular service, likely usage, methods of evaluating service prior to subscribing, attitudes toward service offered by wireline and non-wireline companies, additional desirable features, preferences concerning portable or mobile units, particular equipment suppliers and purchase or rental of equipment (MCI Vol. 3, App. 2, pp. 2–3). A principal conclusion drawn by MCI from these sessions is that the interviewees generally regard cellular service as the application of a new type of technology to produce an additional and more expensive form of telephone service, but with different applications (MCI Vol. 3, App. 2, pp. 7–8; MCI Ex. 16, pp. 1–2).

13. Celcom conducted a telephone survey of 100 businesses in the Pittsburgh SMSA selected from a telephone directory. Data were collected on such matters as preference concerning type of cellular subscriber unit, whether the interviewee would subscribe to cellular service at specified monthly rates, and preference concerning lease or purchase of equipment (Celcom Ex. 2, pp. 1–7). Although the survey was conducted to determine and confirm the demand for cellular service, the circumstances of that demand and the type of service required (Celcom Ex. 2, pp. 1–2), Celcom states that system and cell-by-cell subscriber projections were not directly derived or calculated from the results of the study (Celcom R. Ex. 21, App. A, p. 2). Celcom states further that the study was used to provide additional information relating to cellular need and demand in Pittsburgh. It was not intended to be a scientific statistical poll or survey, or to produce a sales forecast of subscribers on the Celcom system (Celcom Ex. 21, App. A, p. 2).

14. To arrive at its subscriber forecast, CMS commissioned six nationwide market research studies on behalf of CMS in Pittsburgh as well as its other cellular affiliates, including analyses by Claritas Corporation and Westat, Inc., in an attempt to ascertain the size and nature of the Pittsburgh market for cellular services (CMS Ex. II, pp. 2–19, Vol. II, Introduction). In general, CMS' research is based on two assumptions. First, CMS assumed that businesses will be the primary users of cellular service. Second, CMS identified radio pager usage as the precursor of cellular radio (CMS Ex. II, pp. 5, 12–14, Vol. III; Tables 3–7A, 3–8A, 3–19A).

15. CMS' first study, the Claritas Corporation survey, was designed to estimate demand for cellular service by analysis of pager penetration rates in various markets in which CMS' parent, Graphic Scanning Corporation, offers paging services. The study does not address the correlation between demand for paging and cellular service, nor does it consider the relevance of pager demand to the potential market for cellular service (MCI R. Ex. 3, p. 11). It does, however, demonstrate a likelihood among pager users that the propensity to purchase communications services is more a function of industrial classification than location. Market-to-market differences are generally explained by the distribution mix of industrial classifications within individual markets (CMS Ex. II, p. 14; CMS Vol. II, Sec. I, pp. 3–6).

16. Next, three telephone surveys were conducted, all using the same questionnaire (CMS Vol. II, Sec. III, p. 1; Vol. III, Ch. 3). Two of the surveys were conducted by Graphic Scanning. One was of selected businesses in Pittsburgh drawn from the general Pittsburgh business population. The other was of selected Graphic Scanning pager customers in Pittsburgh. The third telephone survey was conducted by Westat, Inc. in an effort to glean information concerning quantity of interest and subscriber demand at different monthly charges ($110, $130 and $150 for cellular service and equipment lease) for the Pittsburgh SMSA. The universe for the Westat study was private business establishments. The surveys considered such things as the likelihood of businesses using cellular service at various costs (very likely, probable, uncertain and unlikely) and the number of units the business anticipates acquiring (CMS Vol. III, Ch. 3, App. D, questionnaires). Results of these surveys appear in two sets of tables, both non-adjusted and adjusted for non-response (CMS Vol. III, Sec. II and III; Vol. III, Sec. 3). Graphic Scanning also conducted two mail surveys similar to the telephone surveys relying on the same universe, *i.e.*, business population and Graphic customers and employing the same questionnaire. These surveys collected information concerning highest monthly charges and anticipated cellular usage and habits (CMS Vol. II, Sec. IV and V).

17. The Westat Study employed a probability sample subdivided into strata and was conducted simultaneously in the top 30 cellular markets in which Graphic Scanning is an applicant. Data for the total sample of 2,171 interviews for the top 30 cellular markets were combined with 73 Pittsburgh SMSA interviews using a composite estimation procedure (CMS Vol. III, Ch. 3, p. 3–1). The figures for the Pittsburgh SMSA proposed by Westat are derived from use of the composite estimation procedure in which a weight of 0.3 is assigned to the relevant Pittsburgh SMSA-only data, and a weight of 0.7 is assigned to the relevant top 30 general cellular market data. The composite estimation technique was employed because it yields approximately the minimum sampling error and, on average,

considerably improves the estimates for individual areas (CMS Vol. III, Ch. 3, pp. 3–4, 3–5).

18. The Westat survey estimates a need for 42,300 cellular units (24,500 mobile and 17,800 portable units) during the first five years of service in Pittsburgh at a charge of $110 by establishments reporting "very likely" or "probable" cellular use.[6] Westat notes that its conclusions must be interpreted as indications of interest rather than as predictions of use (CMS Vol. III, Ch. 3, pp. 3–1 and 3–2). Although CMS witness Paradis, a principal of Tetrion Consulting Group, Inc. and the CMS expert primarily responsible for CMS' demand projections, states that he relied on the six CMS studies in arriving at a forecast of effective demand for the proposed Pittsburgh system (CMS Ex. II, p. 13), a nexus between the survey results and demand projections is nowhere documented (MCI R. Ex. 3, pp. 16, 21). Mr. Paradis has forecast demand for 13,584 cellular units in Pittsburgh by year five. The estimator employed by Paradis is 1980 Pittsburgh SMSA census population multiplied by a projected need of .0060 cellular units per capita (based on 1980 census) (2,264,000 x .0060 = 13,584) (CMS Ex. II, p. 14).

19. *Ability to Accommodate Anticipated Demand.* MCI proposes to construct its initial system with 14 cell sites and sufficient channels to handle the projected demand for service through the second year (an estimated 2,200 subscribers) (MCI Ex. S-1, pp. 2–3; MCI App. Vol. I, p. 5–1). MCI's demand projections are based on its demographic analyses and market surveys and are used in conjunction with its cell plan to derive a frequency plan to accommodate need (MCI App. Ex. 5, p. 5–1). MCI's proposed CGSA, except to the extent discussed in paragraph 8 above, covers areas where it has anticipated great demand for service (*i.e.*, city of Pittsburgh, major traffic arteries and the Pittsburgh International Airport). MCI has allocated four cells specifically for service to the city of Pittsburgh (MCI Ex. 2, p. 2–1). MCI's frequency and channelization plan for the first year of operation includes the initial installation of all fourteen base sites and radio channels necessary to accommodate the projected demand through the end of the second year. To arrive at its frequency plan, MCI analyzed its market research estimates of the total number of subscribers expected to determine anticipated traffic load for the SMSA. A map showing population density for the Pittsburgh area was then used to determine total population in each of the cells in the system. Subscribers were apportioned among the cells in the same proportion as the population served by that cell. The total traffic for each cell was determined by assuming a peak communications channel load of 0.04 Erlangs per subscriber. The

---

[6] This figure is based on the assumption that non-respondents will behave in the same manner as respondents.

number of channels at each site was then determined on the basis of the grade of service desired (0.02 Erlang B).[7] When a site was split into two portions by using directional antennas, the number of channels was determined for each cell separately. MCI plans no further adjustments to the number of channels thus obtained (MCI App. Ex. 5, p. 5–7). MCI will implement 172 voice channels and 16 control channels (two of its 14 cells will be sectorized in the first year). (MCI App. Ex. 5, Table 5.3–1, Supp. Ex. 1, pp. 2–3).[8] Accordingly, MCI will use the L.M. Ericsson AXE-10 central switch (MCI Ex. 17, p. 1) and will locate its control point for its Mobile Telecommunications Switching Office (MTSO) and Cell No. 1 at one of two current locations of MCI's long distance switching and radio equipment in Pittsburgh (MCI Ex. S-1, p. 6; Ex. 5–1, p. 6). The MTSO will include the Ericsson central switch supplemented by a Mobile Telephone Subsystem (MCI Ex. 17, p. 3). Also located at the MTSO will be MCI's Cellular Network Management Center. This center will control all administrative, technical and maintenance functions for overall management of the system. The MTSO and base stations are equipped with alarms and status indicators that are connected to the center by remote control, which facilitates control over the system from a central location (MCI Ex. 17, pp. 4–5; Ex. S-1, p. 9).

20. MCI will use modular base station transmitting and receiving equipment manufactured by SRA Communications, a company associated with Anaconda-Ericsson (MCI Ex. 18, p. 1). Where buildings are not now available at a site, MCI will construct a prefabricated facility and ship it to the location (MCI Ex. 19, p. 19–2, 19–3). Of the 14 cells MCI intends to construct as part of its initial system, the ten interior cells will be equipped with omnidirectional antennas. Only the four sites at the edge of the SMSA will use

---

[7] Grade of service is a measure of the probability that, during a specified period of peak traffic (that hour within a 24-hour period in which the most calls are placed and/or received), a call offered to a group of trunks or circuits will fail to find an idle circuit at the first attempt (*i.e.*, the ratio of the number of uncompleted calls to the number of calls attempted in a specific one-hour period). A .02 GOS, for example, means that during the busiest hour of the day, an individual has a 98% probability that his call will be either received or transmitted on the first try. In designing a cellular system, the designer uses grade of service objectives as well as "peak" or busy hour traffic to determine channel requirements. Other factors involved include adoption of assumptions concerning user habits including the number of calls made per hour and average call length. These assumptions have been reduced to mathematical formulas and resulting "Erlang" tables. The formula on which the Erlang B traffic tables are based reflects the assumption that the subscriber, finding all channels busy, will immediately hang up and disappear from the system for some specified time period.

[8] Cells which are sectorized employ multiple directional antennas, each serving a particular portion of the cell (sector). Channels allocated to the cell are divided among the sectors. Thus, subscribers in a sectorized cell have available for their use the channels that are assigned to the sector they are in. Omnidirectional cells employ a single antenna and have all channels available to all subscribers in the service area.

directional antennas (MCI Ex. S-1, p. 3). MCI anticipates construction of new towers at nine of its cell sites (MCI S-1, p. 7). MCI proposes to construct its downtown site first, and to proceed with cell construction in a seven cell pattern with 12 mile radius cells with the exception of the Beaver Falls site which was moved slightly to the west to place it closer to the center of Beaver County. MCI proposes to place six sites in a four-for-one split cell position around the downtown site to provide signal coverage in the area where the heaviest demand is anticipated (MCI Ex. S-1, p. 4).[9] MCI proposes a grade of service (GOS) of .02 using the Erlang B traffic table, for a two percent chance of blocking during the busy hour. MCI plans to monitor traffic load continuously in order to ensure that the GOS is maintained.

21. Celcom proposes to construct an 11 cell system in Pittsburgh with two cells allocated specifically to serve the city of Pittsburgh (Celcom Ex. 4, p. 4). The applicant arrived at this 11 cell system by instructing its engineers to develop the largest CGSA possible that would cover areas where service was "necessary or would be economical" (Celcom Ex. 4, p. 2). Celcom proposes to use a central switch manufactured by Harris Corporation, as well as Harris Corporation base station equipment (Celcom Ex. 5, p. 1). Celcom proposes to locate its central switch near the telephone offices serving the switch (Celcom Ex. 3, p. 3). The switch will provide data on the blocking rate on at least a daily basis (Celcom Ex. 6, p. 2). Celcom's system is also equipped with dynamic frequency reassignment (Celcom R. Ex. 22, p. 3). Celcom plans to construct its system using the seven-cell pattern in which each cell is surrounded by six cells of the same radius. The cells are to be placed 16 miles apart, starting with a cell providing service to the market center (Celcom Ex. 4, pp. 2–4). Initially, Celcom proposes to construct five cells beginning in the central Pittsburgh area where it is expected that demand is heavy, with the remaining cells added one per month with the initial system being completed within 24 months of grant of the construction permit (Celcom Ex. 5, p. 2). Celcom has forecast a four year channel requirement of 232 voice channels with a capacity designed to handle its forecast of 6,600 subscribers at a .05 Erlang B GOS (Celcom Ex. 5, p. 2; Celcom Ex. 13A, p. 3). Celcom has divided its frequencies into groups of 44 or 45 to provide .05 GOS to 1,230 subscribers initially (Celcom App. Ex. 13, p. 1). In addition, Celcom proposes to maintain a .01 GOS during non-busy periods(Celcom Ex. 1, p. 4). The evidence of record indicates, however, that it will be unable to maintain either standard through year four.[10]

---

[9] The four-for-one cell split consists of the construction of new cells having one-half the radius and one-fourth the area of the old cells. As old cells are covered by smaller new cells, the old sites become a part of the new cellular structure (MCI Ex. 21, p. 21–13).

22. CMS proposes to construct and operate a 16 cell system in Pittsburgh. All 16 cells, which are expected to satisfy projected demand up to and including the fifth year of operation, will be constructed during the first year, although not all required equipment will be immediately installed (CMS Ex. IV (A), pp. 1–4). At first, CMS will operate its system in an essentially omni-directional mode, with later service provided in a directional mode (MCI R. Ex. 4, p. 11). CMS' initial system design has placed cells to provide multiple cell overlap, particularly in the downtown Pittsburgh area (CMS Ex. IV (A), p. 1). CMS states that in designing its initial system configuration, its goal was to provide service to: (1) downtown streets and buildings; (2) all expressways and main highway arteries; and (3) mass transportation (CMS Ex. IV, p. 2). CMS will use a four-cell reuse pattern with one group of 78 channels per cell (CMS Ex. IV (A), p. 5).

23. The CMS system will use the Motorola EMX-500 Electronic Mobile Telephone Exchange, with voice circuits to all cell sites (CMS Ex. IV, p. 3). The control point will likely be located at 1000 Penn Avenue in downtown Pittsburgh.[11] CMS will use Motorola base station controller and RF equipment at 11 high density cells, and E.F. Johnson and Graphic Scanning equipment will be used at the five remaining low density cells (CMS Ex. IV(A), pp. 3–4). All cell sites will be equipped with auxiliary power sources (CMS Ex. IV(A), p. 4). The control point will be linked to the cell sites by a 2400 bps (beats per second) digital link with redundancy for large or remote cells (CMS Ex. III, p. 4).

24. CMS forecasts that a total of 154 channels will be utilized through its first year of system operation, and 251 channels will be utilized through the second year. CMS will use 714 channels in its completed 16 cell system (CMS Ex. IV, p. 12). This channel plan will accommodate the demand forecast for the system of 2,049 subscribers in year one and 4,761 subscribers in year two. However, despite its design GOS objective of .01 Erlang B, even CMS concedes that the GOS is likely to drop to .05 during years four and five (CMS Ex. IV, pp. 2, 12–13; Ex. IV(A), p. 4). CMS will monitor its system traffic constantly for the purpose of maintaining its design GOS (CMS Ex. IV, p. 14).

25. *Service to Roamers*. MCI's proposed system will provide a variety of roamer functions including: (1) fully automatic registration with automated call forwarding; (2) fully automatic registration

---

[10] Celcom will be unable to meet its GOS objective by year 4. Using Celcom's data for anticipated traffic in the fourth year of operation, CMS rebuttal witness Wells has calculated that Celcom's GOS service will decline to .09 or lower (CMS R. Ex. 1, pp. 30–31). MCI rebuttal witness Stevens also concluded that Celcom's anticipated traffic for year four precluded Celcom from maintaining a GOS of .05 (MCI R. Ex. 5, pp. 6–7).

[11] This location is contingent upon CMS' chosen method of interconnection with the telephone company (CMS Ex. IV, p. 2).

with local automatic temporary registration; (3) fully automatic registration with local manual temporary registration; (4) automatic origination, manual reception of calls; (5) wholly manual; (6) automatic origination only, no call reception possible; and (7) manual origination only, no call reception possible (MCI Ex. 17, pp. 11–15). MCI plans to seek interconnection arrangements with other cellular system operators where there is high traffic community of interest between systems, with a goal toward fully automatic roamer service (MCI Ex. 12, pp. 9–10). In instances where the incidence of roaming between systems is low, MCI will seek arrangements whereby roamers will have full use of cellular communications (MCI Ex. 12, p. 10). In the event that nationwide roamer capability may not be possible during the first year of operation, MCI will offer roamer service during the first year in Pittsburgh, regardless of the state of intersystem roamer registration (MCI S.1, p. 5).

26. Celcom will offer service to two types of roamers: wireline subscribers located within the CGSA and subscribers located outside the CGSA (Celcom Ex. 9, p. 2). Celcom intends to maintain an exchange of subscriber information with the wireline carrier (Celcom Ex. 9, p. 2). Pursuant to Celcom's plan, roamers will register with the system for originating and receiving calls, at which time a local number will be assigned. Since Celcom does not propose to employ fully automatic registration, a Celcom user must either notify the Celcom system when the first call is initiated each time he enters the system's service area, or he must notify his home switch which will, in turn, notify the Celcom system (Celcom Ex. 9, p. 2). Finally, Celcom intends to establish a central computerized clearinghouse which will be available to all cellular operators. This clearinghouse will have three primary functions: (1) to forward calls; (2) to charge and credit the affected systems and their subscribers; and (3) to act as a credit-information clearinghouse (Celcom Ex. 9, p. 3).

27. The CMS system will be equipped with fully automatic roamer registration (CMS Ex. VI, p. 7). Registration consists of an automatic call sequence that is executed by the subscriber equipment when it detects a system identification code on the control channel that is different from the one it has been using (CMS Ex. III, p. 10). Thus, a foreign subscriber will be registered in the CMS Pittsburgh system under the local number assigned to him in his home system. When a local Pittsburgh caller wishes to contact the roamer, he will first dial an access number and upon hearing the second dial tone, dial the foreign subscriber's home system local number (CMS Ex. III, p. 11; Ex. VI, p. 4, CMS R. Ex. I, pp. 25–26).

### *Issue (b)*

28. *Expansion Plans*. MCI will construct its initial first year system with cell sites and channels sufficient to accommodate

projected demand through the second year of operation (MCI App. Ex. 5–7, MCI S. 1, p. 2). Since the anticipated two year capacity will be in place, MCI does not foresee the need for expansion within the first two years of operation, and the system is equipped to handle any unanticipated initial increased demand without immediate expansion (MCI S. 1, p. 2). In lieu of specific channel plans beyond the second year of operation, MCI has adopted a five step plan for expansion of its system: first, addition of channels within the baseline allocation; next, addition of channels outside the baseline allocation; third, addition of sites; fourth, conversion from omnidirectional to sector antennas; and finally, cell splitting (three-for-one or four-for-one). Step three is an alternative prior to steps four and five, and need not be initiated when moving from borrowing to sectorization (MCI Vol. 2, Ex. 21, pp. 18–23). Prior to sectorization, MCI's 14 cells will be laid out in a seven cell pattern. After sectorization (step 4), the reuse pattern is essentially 21 cell reuse clusters, there being three sector cells per site using antennas of 120 degree nominal bandwidth, oriented at 120 degree intervals (MCI R. Ex. 11, pp. 6–7). MCI's first site is its downtown site, with the remaining cells laid out in a regular 7-cell hexagonal pattern with a 12 mile radius (7 sites per reuse cluster) (MCI App. Ex. 5, p. 1; MCI S. 1, p. 4).

29. MCI's cell shapes and sizes appear to be located as closely as possible to points on the expansion grid although variation from the idealized uniform hexagonal cells does occur owing to: (1) site locations which deviate from perfectly regular grid spacing associated with idealized cellular structure; (2) the effect of different antenna heights which influence the Carey contours and the shape of the boundary where two sites have the same signal strength; and (3) the influence of varying terrain, including buildings, affects all boundaries (MCI App. Ex. 5, p. 5–5).

30. MCI's frequency plan comports with the co-channel reuse criteria (MCI R. Ex. 4, Att. A and pp. 2–3, 7). MCI does not propose to reuse adjacent channels at the same site. Its use of adjacent channels at adjacent sites is minimal and in no case are adjacent signaling channels used at adjacent cell sites (MCI R. Ex. 4, p. 7).

31. MCI will continuously monitor traffic loading to determine GOS during peak hours for each site. MCI will incrementally increase site capacity in order to maintain design GOS. This will be accomplished by designing a baseline allocation plan for use in the seven sites in the reuse cluster. As the system grows, each site will retain the same baseline channel-set allocation so that an installed transmitter need not be retuned. Since sites do not initially use full baseline allocations, additional channels can be assigned (MCI Vol. I, Ex. 5, pp. 5–1, 5–7; Vol. II, Ex. 21, p. 21–9).

32. Celcom plans to phase in its 11 cell system and will construct at least five of its cells during the first year of operation (Celcom Ex. 5, p. 3). The order of constructing the remaining cells will depend

upon demand indications from the central switch (Celcom Ex. 6, p. 4). Some channel borrowing may occur during the initial stage (Celcom Ex. 6, p. 4). Once all of its cells are constructed, Celcom's system will accommodate projected demand through year four although not necessarily at the design grade of service. Celcom gives no step-by-step expansion plan except to note that expansion beyond the initial stage will be accomplished through frequency reuse and cell splitting (Celcom App. Ex. 13, p. 1; Ex. 6, p. 10). Celcom also states that decisions concerning congestion will be made on a case-by-case basis. Celcom has provided a fourth year channel assignment plan, divided on a per-cell basis in the fourth year and a subscriber forecast on a year-by-year basis (Celcom Ex. 4, App. B; Ex. 5, App. A). Celcom plans to begin operations with relatively few channels and to add channels until the full 232 voice channel plan is completed (Celcom Ex. 13-A, pp. 3, 8). During this initial four year period, Celcom's cell structure and engineering parameters will remain the same (Celcom Ex. 13A, p. 8). Celcom will establish a procedure to assure that anticipatory or corrective action will be taken promptly in the event that service quality begins to fall below .05 GOS. "At the very least," Celcom intends to take action when the blocking rate at the cell reaches 5% on any five days in a 20 day period (Celcom Ex. 6, p. 3).

33. While Celcom's frequency assignment plan corresponds to the engineering parameter tables submitted with its application, the frequency set assignments do not follow the standard 7-cell plan that Celcom proposes to use (Celcom Ex. 4, App. B; Ex. 4, p. 6 and App. A; MCI R. Ex. 4, pp. 11–12). Accordingly, Celcom's plans cannot be reconciled with a regular reuse grid pattern. Despite Celcom's claim that substantial system expansion can be accommodated within its existing cell structure, its year four cell structure would have to be sectorized at an earlier stage to minimize adjacent channel interference (Celcom Ex. 6, p. 3; MCI R. Ex. 11, pp. 10–11, 19). The adjacent channel use in overlapping cells will result in an increased probability of channel interference in cells 5 and 7 and a corresponding reduction in signal quality (MCI R. Ex. 11, p. 19).

34. CMS will construct its first year system with cells adequate to satisfy fifth year market demand (16 cells). In the first year, however, CMS will install only that equipment and distribute only those channels necessary to meet forecasted first year demand (CMS Vol. I, Ex. IV, pp. 2–4). Frequencies will be assigned on a four-cell reuse pattern with a group of 78 channels assigned to each cell (CMS Ex. IV(A), p. 5). Channels will be assigned in groups of ten, with each channel being spaced at least 21 channels apart. CMS states that its frequency plan was prepared for a fully mature fifth-year system and that the channels selected from each group in a cell are those which will not be needed in any other cell for the longest period of time (CMS Ex. IV)A), pp. 5–6).

35. For the first five years, expansion of system capacity will

occur by the addition of channels at the cell sites (CMS Ex. III, p. 9; Ex. IV, pp. 9, 12–16; Ex. IV(A), pp. 5, 8, 11–13). Addition of channels will occur in one of two ways. If additional frequencies can be added, frequency allocations will be extended and cells will be subdivided to obtain frequency reuse (CMS Ex. IV, p. 9). If additional frequencies cannot be added, CMS will add new cells or convert omni-directional sites to sector transmit (CMS Ex. IV, p. 9).[12] As noted, CMS proposes an initial GOS of 0.01 with a second GOS objective to take action to reduce blocking when performance of all the cells with the heaviest loading consistently equals or exceeds 0.05. When the GOS is 0.05 or more for any cell on 21 of the preceding 30 days, the system will be analyzed to determine what action is necessary to improve GOS (CMS Ex. III, p. 16; Ex. IV, p. 2).

36. CMS' engineering data shows omni-directional operation of all cells and maximum power for all but two sites (Celcom R. Ex. 20, p. 5; MCI R. Ex. 4, p. 8). The close spacing of the cells in the central area creates substantial overlap of cells with 472 square miles covered by four or more cells (CMS R. Ex. 1, p. 6).[13] Specifically, the

---

[12] The identification of cells scheduled to be sectorized at full implementation is set forth at CMS Ex. IV, pp. 14–16.

[13] CMS argues that such overlap is beneficial and necessary to provide full street level coverage for both portable and vehicular units. Cells are also said to be concentrated to maximize in-building coverage. CMS refers to this concept as Depth of Coverage (CMS Vol. 1, Ex. IV, pp. 1,2; CMS Ex. IV(A), p. 2; CMS R. Ex. I, p. 7). CMS argues further that MCI and Celcom base their arguments and proposed findings on comparison of D/R ratios (Distance between cells/Radius of cells) (CMS P.F., p. 19, para. 48; Celcom Ex. 16, pp. 2,3; MCI R. Ex. 4, p. 10). CMS takes the position that a better standard for analysis of co-channel interference problems in high density cell systems is the C/I (Carrier/Interference) contour at a 17 dBu ratio. According to CMS, the reuse grid is thus generated from optimum C/I relations for all co-channel cells and cell sizes are adjusted to accommodate frequency reuse, sectorization and cell subdivision (CMS P.F. at p. 20, para. 48). Furthermore, CMS contends that there is no evidence in the record from which to conclude that there is any incidence of unacceptable co-channel interference in the fifth year CMS system configuration. CMS' arguments are unpersuasive. Initially, it is noted that pursuant to Section 22.903(c) of the Commission's Rules, applicants must comply with Section 22.504 of the Rules and F.C.C. Report No. R-6406 "Technical Factors Affecting the Assignment of Facilities in the Domestic Public Land Mobile Radio Service" by Roger B. Carey (Carey Report). The Carey Report adopts neither D/R nor C/I ratios, but establishes as the point of comparison the proposed 39 dBu contours. The procedure set forth by the Carey Report for evaluation of co-channel interference between two stations considers the terrain and time variations of the desired and interfering fields and the minimum acceptance ratio of desired to undesired signals, and applies them to a formula which determines the required ratio between the desired and undesired fields. None of the parties has presented sufficient and persuasive evidence to compel acceptance of an alternative comparative technical standard to compel acceptance of an alternative comparative technical standard not adopted by the Commission and potentially in conflict with expresely adopted standards. In view of the controversy surrounding this technical issue and, in the absence of an express engineering standard on the subject enunciated by the Commission, neither C/1 nor D/R formulas can be said to be definitive. However, the findings

eleven cells that CMS will have sectorized for its fifth year frequency plan are closely bunched together. The greatest distance between any two of them is less than 25 miles.[14] Since, by its own admission, the typical reuse distance for two sectorized cells is 38 miles, CMS' reuse plan for Pittsburgh cannot be achieved without significant co-channel interference. The typical separation for frequency reuse is about 48 miles between cell centers if omni-transmit is involved at both ends (CMS Vol. I, Ex. III, p. 20; Celcom R. Ex. 16, p. 4). Furthermore, if CMS were to reduce cell radii to satisfy its own criteria for frequency reuse, the result would be a drastic and unacceptable (under 75%) reduction in CMS' CGSA coverage (Celcom R. Ex. 16, pp. 1–4; Celcom R. Ex. 21, p. 2).

### *Issue (c)*

37. *Rates, Charges, Practices and Classifications*. The applicants propose to offer basic cellular service at the following recurring monthly rates (MCI Ex. 13, pp. 13–8, 13–9; Celcom Ex. 13, Tariff p. 14; CMS Ex. VI, pp. 24–25):

| | *MCI* | *CELCOM* | *CMS* |
|---|---|---|---|
| Monthly Access Rate | $15 | $40 | $4.95 |
| Usage per minute | | | |
| Day | .25 | .40 | .26 |
| Evening | .15 | .20 | .18 |
| Night | .15 | .20 | .10 |

Celcom's monthly access fee includes 100 minutes of usage per month (Celcom Ex. 13, p. 3 and Tariff pp. 14–15).

38. MCI will bill its customers for each minute of usage (MCI Ex. 13, p. 13–9). Celcom will bill its customers in 30 second increments (Celcom Ex. 13, p. 15). CMS will bill its customers in six second increments after the first half minute of usage (CMS Vol. I, Ex. VI, p. 24a). MCI will assess no additional charge for direct access to intercity carrier systems (MCI Ex. 13, pp. 8–10), while both Celcom and CMS will pass this cost on to the subscribers (Celcom Ex. 13, p. 6; CMS Vol. I, Ex. VI, p. 23). In addition to basic service, MCI will offer service to roamers at $5.00 per day, or $20.00 maximum per billing period, subject to the same usage charges as basic subscribers (MCI

---

here made are based on the fundamental principle that the spacing between cells should follow as uniform a pattern as possible to achieve optimal coverage with minimal intra-system co-channel interference.

[14] CMS shows channel reuse between cells 1,5 and 9: between cells 2,6 and 10; between cells 3,7 and 11; and between cells 4 and 8. The distances between cells 1,5 and 9 are 3.9 miles, 11.9 miles and 15.6 miles. The distance between cells 2 and 6 is 11.4 miles, between cells 2 and 10 is 10.5 miles, between cells 6 and 10 is 18.8 miles, between cells 3 and 7 is 10.9 miles, between cells 3 and 11 is 15.6 miles, between cells 7 and 11 is 24.8 miles and between cells 4 and 8 is 14.0 miles (Celcom R. Ex. 16, p. 4).

Ex. 13, p. 13–9). Also, in addition to basic service, MCI will offer its subscribers optional service features such as: call waiting,[15] at an additional cost of $.15 per minute; (2) call forwarding,[16] at $.25 per call; (3) no-answer transfer,[17] $.25 per call; (4) conference calling,[18] $.30 per minute; (5) operator message assist,[19] at $1.00 per message; and (6) voice mail box[20] at $.20 per minute (MCI Ex. 13, p. 13–10).

39. Celcom's rates are on a send and receive basis. Thus, in mobile-to-mobile calls, both ends pay for use of the service (Celcom Ex. 13, p. 3). In addition to the basic service it offers, Celcom will offer a variety of service features including conference calling, call waiting, call forwarding, speed dialing, no-answer transfer and message storage and retrieval (Celcom Ex. 13, Tariff, p. 15–16). Celcom proposes to offer all of the same services to roamers as are available to local subscribers at the same costs. In addition, however, roamers will pay a daily fee of $2.00 for registration which includes temporary number assignment for incoming calls. All other charges will be billed at the tariff rate. Finally, roamers who use the system for seven consecutive days will be treated as subscribers rather than as roamers and any charges incurred will be credited against the basic monthly fee (Celcom Ex. 13, Tariff, pp. 14, 16).

40. CMS will offer a variety of service features to its subscribers in addition to basic telephone service. These features include: wide area telephone service, camp-on,[21] last number dialed voice message storage and retrieval, emergency service dialing, least cost routing to dedicated other common carrier circuits, voice scrambling and computer prompted telephone answering service. In addition, CMS will offer a special service package which, at a cost of $4.75 monthly, entitles the subscriber to use of the following features: call forwarding; delayed forwarding, call waiting, speed dialing and conference calling (CMS Ex. VI, pp. 2, 24). CMS also states that it will promote resale of its services although it has not indicated how it will do so (CMS Ex. VI, p. 26).

41. CMS' subscriber service charges are on a send and receive basis and are related to both time of day and usage factors. In addition to the cost of basic service, standard service options are available at $1.75 monthly/per package. Distant roamers pay $3.00 per day plus $.35 per minute. Local roamers will pay $4.95 per

---

[15] Allows first call to be put on hold to accept second incoming call.

[16] Redirects incoming calls to another number.

[17] Allows incoming calls to be transferred to another number after a number of rings.

[18] Allows a third party to be added to a call involving a mobile user.

[19] Operator-provided answering and message taking of calls.

[20] Automated answering voice retrieval and customer announcements.

[21] Automated storage of a number attempted but not completed. The number is then periodically attempted without customer intervention. Upon successful completion, the customer is notified by appropriate signal that the connection has been completed.

month. CMS will also offer transmission services for both public and dedicated subscribers (CMS Vol. I, Ex. VI, pp. 24, 24(a)).

42. *Maintenance and Personnel.* MCI will provide maintenance and repairs for its system from the Cellular Network Management Center (CNMC) which will be co-located with MCI's Mobile Telecommunications Switching Office (MTSO) (MCI App. Ex. 15, p. 15–2). MCI's CNMC will be manned 24 hours per day and will control all administrative, operational and maintenance data for its cellular system (MCI App. Ex. 15, p. 15–3). All circuits will be routinely checked and manned by on-site maintenance specialists to provide unscheduled maintenance (MCI App. Ex. 15, p. 15–3). Base stations will be connected to the CNMC for monitoring purposes. In addition, the base stations will be equipped with an alarm system which will notify the CNMC of problems and operators will classify messages by urgency (MCI Ex. 20, p. 2). The CNMC will also monitor traffic at base stations in order to analyze blocking problems and avoid traffic overloads (MCI Ex. 18, pp. 18–20). MCI will maintain a full complement of spare parts and modules and will routinely inspect and conduct field measurements at all radio sites (MCI Ex. 20, p. 20–7). MCI will also maintain a supply of batteries capable of maintaining operations up to 24 hours and emergency generators to maintain AC power in case of prolonged outages (MCI App. Ex. 15, pp. 7–8).

43. MCI will staff its CNMC and MTSO 24 hours per day, 7 days per week. The MTSO will be manned by a manager, a console operator, and two switch specialists during the business day (one switch specialist during non-business hours) (MCI Ex. 32, p. 5). MCI's existing technical staff in Pittsburgh presently associated with MCI's long distance switch operations will also provide routine maintenance for the MTSO (MCI Ex. 10, p. 4; Ex. 33, p. 1). In addition, MCI will staff its CNMC 24 hours per day in three eight hour shifts with a manager and various operations personnel (MCI Ex. 20, pp. 6–7). Finally, MCI will employ one base station manager and one technician for each of its cell sites (MCI Ex. 32, p. 5).

44. During the first year following grant, Celcom proposes a technical staff of three, in addition to a General Manager who will be responsible for system operation and a Chief Engineer who will supervise the RF technicians and computer personnel (Celcom Ex. 11, pp. 2–6). Celcom will expand its technical staff so that by year 4, it will have 11 technical employees including its Chief Engineer (Celcom Ex. 11, pp. 5–7).

45. Celcom has not specifically allocated its technical staff to switch or base station maintenance. Celcom states only that its maintenance plans are keyed to achievement of its targeted grade of service (Celcom Ex. 8, p. 1). Celcom will rely on the expertise of its equipment manufacturer for installation, maintenance and repair of its equipment (Celcom App. Ex. 7, pp. 2–3). In addition, Celcom will rely on the resources of its parent, Associated Communications

Corporation, if necessary and will subcontract for technical personnel as a backup to its own employees (Celcom Ex. 11, p. 7). Finally, on the basis of its belief that since its selected equipment is redundant, completely self-diagnostic and completely modular, Celcom anticipates purely modular replacement for its system (Celcom Ex. 8, p. 3). To the extent that failures do occur, Celcom will classify them according to importance, with failures affecting grade of service having the highest priority (Celcom Ex. 8, p. 3). Audio and visual alarms will be monitored at the control point and Celcom will monitor each site monthly by use of a mobile check which "fixes-in" on a particular channel (Celcom Ex. 8, pp. 4–6).

46. CMS will structure its Pittsburgh system staff as follows: a Vice-President - Technical Services will be responsible for overall design and performance of the network (CMS Ex. VII, p. 2); a Vice-President - Operations will be responsible for operating and maintaining the network. CMS will have access to the resources of its parent for personnel to perform activities such as system design and engineering (CMS Ex. VII, p. 3). CMS employees will be responsible for operating, maintaining and repairing the network and for traffic engineering and network performance monitoring (CMS Ex. VII, p. 4). CMS proposes a staff of 61 employees for the Pittsburgh cellular operation during the first year (CMS Ex. VII, App.C).

47. CMS will man its mobile exchange switching center 24 hours per day (CMS Ex. VII, p. 5). It will also perform a complete system status evaluation daily encompassing all major hardware and software elements including all site equipment and will maintain an alarm system to detect failures (CMS Ex. III, pp. 4–5; Ex. IV, pp. 2–3, 8–10; Ex. III, p. 5). Any system failure which will result in a deterioration of the grade of service will be serviced immediately. All other failures will be serviced within two hours (CMS Ex. VII, p. 5). CMS has incorporated full redundancy in all critical aspects of its system. It will also provide full auxiliary power to prevent loss of service in case of main power failure (CMS Ex. III, pp. 4, 8; Ex. IV, pp. 6–7; Ex. IV(A), pp. 3–4, Table I-B). Finally, CMS has adopted a goal that system outages resulting from software malfunction should not exceed more than 0.2 minutes per year (CMS Ex. VII, App. VII-D, p. 8).

48. *Facilities*. For its base station facilities, MCI will use UHF transmitting and receiving equipment manufactured by SRA Communications, an associated company of Anaconda-Ericsson, which has been specifically designed to operate with the Ericsson AXE-10 MTSO (MCI Ex. 18, p. 1). Both transmitters and receivers can be configured for a wide range of cell sizes. Additional transmitters and receivers can be added individually as channel requirements increase, while either direct or diversity reception is available (MCI Ex. 18, p. 1). A control unit, associated with the transmitters and receivers, is responsible for the signaling procedures between the

base station and the MTSO, the control of the transmitters and receivers, and the fault monitoring of base station equipment. The SRA system permits the connection of up to 16 transmitters and receivers to a common antenna. The equipment is fully compatible with the RF and signaling formats of Part 22 of the Commission's Rules (MCI Ex. 18, p. 2). In its switching facilities, MCI will use the Ericsson AXE-10 cellular switch which will be applied to both MCI's cellular service and to its long distance service (MCI Ex. 17, p. 1).

49. Celcom will use Harris Corporation equipment, including central switch and cell site controllers (Celcom Ex. 5, 7). This equipment will have redundant capabilities, *i.e.*, duplicating of key pieces of equipment as well as diagnostic features (Celcom Ex. 7, p. 1). Harris equipment provides redundancy for the paging transmitter and locating and access receivers (Celcom Ex. 7, p. 2). Self-diagnostic equipment will be installed at the cell sites and interconnection of the cell sites to the control switch will be redundant (Celcom Ex. 7, p. 3).

50. CMS will use the Motorola EMX-500 Mobile Telephone Exchange as its central switching facility. Motorola DynaTAC Base Site Controllers and RF equipment will be installed at high density cells, *i.e.*, cell nos. 1–11 and Graphic Scanning Cell Site Controllers and E.F. Johnson RF equipment at low density cells, *i.e.*, cell nos. 12–16 (CMS Ex. IV, pp. 3, 6; Ex. IV(a), pp. 3–4, Table I-B).

## *Conclusions*

51. This proceeding involves the mutually exclusive applications of MCI Cellular Telephone Company, Celcom Communications Corporation of Pittsburgh, and Cellular Mobile Systems of Pennsylvania, Inc. for authority to construct and operate a new cellular system in the Pittsburgh, Pennsylvania modified Standard Metropolitan Statistical Area. All three applicants have been found to be legally, technically, financially and otherwise qualified.[22] In order to determine what disposition of these applications would best serve the public interest, convenience and necessity, the Commission consolidated them for hearing upon the three issues which are discussed below.

### *Issue (a)*

52. This issue calls for a comparison of the geographic areas which the applicants propose to serve, the relative demand for services in these areas and the ability of each applicant's system to accommodate the anticipated demand for both local and roamer

---

[22] The Commission provided that any grant to CMS should be conditioned upon the possible reexamination or reconsideration of that applicant's qualifications as a result of whatever decision is reached in *A.S.D. Answer Service, Inc., et al.*, 47 Fed. Reg. 40230, published September 13, 1982.

service. In *Cellular Communications Systems*, 86 FCC 2d 469, 502 (1981) (hereinafter *Report and Order*), the Commission instructed that the geographic area which an applicant proposes to serve is a major basis of comparison. In comparing proposed service areas, other significant factors to be considered are the presence of densely populated regions, highways and areas likely to have high mobile usage characteristics, as well as indications of a substantial public need for the services proposed, including results of public need surveys.

53. *Geographic Area and Population*. For purposes of comparison, the geographic area an applicant proposes to serve includes that area within its 39 dBu contours which falls within the CGSA and, in turn, is within the relevant SMSA. See *Designation Order*, at para. 16, footnote 12. MCI's proposed composite 39 dBu contours cover 84.6% of the geographic area of the Pittsburgh, Pennsylvania SMSA. Celcom's proposal covers 70.4%, and CMS' covers 79.3%. The significance of the approximately 6% difference between MCI's proposed CGSA size and CMS' becomes even more apparent when considering the area and populations to be served within the proposed CGSAs. Specifically, MCI's proposed CGSA will cover approximately 14% more of the SMSA than Celcom's proposal. MCI's composite 39 dBu contours cover 2,610 square miles and approximately 96.96% of the total Pittsburgh SMSA population. Celcom's system encompasses 2,197 square miles and 92.8% of the total population, while CMS' proposal covers 2,324 square miles and 94.4% of the population.[23]

54. None of the applicants has proposed to serve the entire Pittsburgh SMSA. MCI fails to include in its proposed coverage a portion of southwest Westmoreland County that includes a 10–15 mile section of Interstate I-70, a major SMSA highway. Celcom's proposal excludes two significant areas: portions of Beaver County, north of New Brighton and portions of Washington County from Lagonda to the south boundary and west to the intersection of Routes 331 and 231. CMS' proposed coverage excludes the northwest corner of Beaver County, a section at the boundary between Washington and Beaver Counties and a portion of Washington County southwest of Interstate 70 and Route 221. In comparison with the areas of the SMSA excluded from the Celcom and CMS proposed CGSAs, MCI's 10–15 mile gap in coverage of Interstate 70 does not detract from the general superiority of its CGSA coverage. With respect to the population encompassed by the proposed 39 dBu contours, a slight preference is accorded MCI for its proposal which

---

[23] This conclusion is based on the assumption of a minimum elevation value of 100 feet. See footnote 4, *supra*. However, if MCI's 25 foot minimum elevation assumption were to be used, the differences between its proposal and CMS' would be even greater. In addition, using the 25 foot assumption, a small interior gap in coverage appears in Celcom's proposal.

will serve nearly 60,000 (2%) more people than CMS and approximately 100,000 (4%) more people than will Celcom.

55. *Relative Demand for Service.* Each of the applicants has conducted subscriber research to determine relative demand for cellular service in the SMSA and each has formulated an estimate of the number of subscribers anticipated during the first years of operation. MCI is accorded a comparative preference for its determination and analysis of demand for service in Pittsburgh. The public need surveys conducted by both Celcom and CMS are seriously flawed in several respects. Celcom's analysis of relative demand for service is patently defective. Its market research played no part in its determination of projected demand in Pittsburgh, but was used, according to Celcom, to provide additional information relating to cellular need and demand in the SMSA. It was not intended to be a statistically valid study, or to produce a sales forecast of subscribers for the Celcom system. Nowhere does the record support Celcom's analysis of projected demand in the SMSA. Although CMS' research represents an extensive undertaking, it, too, is seriously flawed. Initially, it is noted that the underlying assumptions relied upon by CMS are nowhere documented in the record. CMS' decision to assume that businesses will be the primary users of cellular service, caused it to exclude from its research and consideration the entire market potential of non-business users. CMS' second assumption that pager service is the precursor of cellular radio further limited its initial sample group without adequate explanation. Furthermore, although CMS asserts that the results of its research were relied upon in arriving at its demand projections, that fact is not documented in the record. Finally, CMS' demand projections do not appear to consider the presence of a wireline carrier in Pittsburgh. To arrive at its demand forecast, MCI commissioned four studies: a public need survey, a selected industry survey, open-ended focus group sessions and a demographic analysis of the Pittsburgh SMSA. Only the focus group sessions, which MCI contends were simply intended to provide qualitative results and were not used to arrive at demand projections for Pittsburgh, were not conducted in the SMSA. For all other research, MCI's survey sample was drawn locally and included both potential personal and business users. The only unsupported assumption on which MCI relied was the assumption that cellular users would likely be from households with incomes of at least $20,000 or more. Such an assumption, however, is not fatal to the trustworthiness of MCI's research.

56. *Ability to Accommodate Anticipated Demand.* All three applicants have designed CGSAs with cells covering obvious areas where, in general, need can be anticipated, *i.e.*, downtown Pittsburgh, major rivers and highways and the airport. MCI's initial system will have 14 cells and accommodate the needs of 2,200 subscribers, the projected demand through its second year of

operation. Initially, Celcom will construct five of its proposed 11 cells, beginning with construction in the downtown Pittsburgh area. The remaining cells will be phased in over time with the system complete by the 24th month, and be capable of providing service to 1,230 subscribers. CMS will construct its 16 cell system during the first year, although not all required equipment will be installed. Since CMS' system is based on a five-year projected demand, equipment will be installed during the first five years as demand increases. CMS, too, will begin construction and operation of its system beginning with its downtown Pittsburgh sites. CMS' channel plan will accommodate its demand forecast of 2,049 subscribers during year one.

57. In number (*i.e.*, eight), CMS has the greatest concentration of cells placed to serve the city of Pittsburgh itself. MCI has allocated four cells for service to the city, and Celcom has allocated only two. However, fundamental principles of cellular design indicate that the spacing between cells should follow as uniform a pattern as possible to achieve optimal coverage with minimal intra-system co-channel interference. Obviously, there must be some overlap because omnidirectional transmission over flat terrain results in a nearly circular 39 dBu contour. The overlap eliminates the existence of unserved pockets between cells resulting in a temporary interruption of service, and facilitates the hand-off of traffic as the vehicle moves between cells. In Pittsburgh, where the terrain is not flat, spacing considerations applicable to ideal propogation analyses may not be realistic. Both MCI and Celcom have provided reasonable spacing between cells. Both applicants' cell sites appear to be located close to an idealized grid structure. Starting with a core cell, MCI and Celcom will add new cells to expand outward and add new coverage areas. CMS, however, has concentrated its cells resulting in a lack of uniform spacing between them in the central Pittsburgh area. CMS' cells 1 and 5, for example, are less than four miles apart. Nonetheless, CMS plans to reuse channels at those cells. In several other cases, the reuse of channels is contemplated at cells which are spaced no more than 20 miles apart. As a result, the record reflects serious potential co-channel interference problems in CMS' original proposal. Furthermore, this lack of uniformity in spacing requires that CMS sectorize the majority of its cells in a way that may well preclude the rapid and inexpensive reallocation of channels from lightly-used cells.

58. CMS argues that its cellular configuration is necessary in order to ensure full street level coverage for both portable and mobile cellular units. CMS refers to this concept as "depth of coverage" and contends that its cells are concentrated in order to maximize in-building coverage. CMS seeks a comparative preference on the basis of its "depth of coverage," citing *Public Notice - Cellular Application Filing Procedures*, 51 R.R. 2d 143 (1982), issued by the

Common Carrier Bureau. There, in response to the question of whether comparative preference would be accorded for a CGSA proposal which covered the entire SMSA, the Bureau stated that, for comparative purposes, preference for CGSA coverage would depend on whether, in a particular market, the applicant has demonstrated that it would be desirable to serve the entire SMSA based on considerations of population density and actual demand for service. CMS interprets this language to mean that comparative preference will be accorded to proposals involving intensity of coverage (more cells per area) in areas of the CGSA determined to have high usage characteristics. The short answer to CMS' argument is that it has mischaracterized the Bureau's statement. It appears from the Public Notice that the Bureau's concern was not the "depth of coverage" of areas ascertained to have high demand for cellular service, but the fear that some areas in need of service would be overlooked entirely. As discussed above, there is some area of ascertained need overlooked by each of the applicants. However, CMS has not demonstrated on the record that it covers any important area not covered by MCI and Celcom which would entitle it to a preference. In fact, it has not shown any nexus whatsoever between its proposed service area and its determination of need. Although CMS' initial system design is unique, it does not appear to be entirely consistent with the Commission's mandate that applicants design their systems to guarantee rapid implementation and expansion of cellular service. Rather than being a system which evolves from the initial stages to a more mature system, CMS has designed one likely to require substantial amounts of retuning and reassessment as demand increases.

59. MCI's preference is based on the fact that its proposal far better reflects an understanding of demand for service in the Pittsburgh SMSA. To the extent that demand is heavier in the downtown area of Pittsburgh, requiring greater "depth of coverage," MCI's proposal, as discussed above, also includes consideration of that demand.

60. *Service to Roamers*. All three applicants propose to offer service to roamers in a variety of ways, *i.e.*, manual registration or automatic registration. The services to be offered will be the same as those available to regular subscribers and at the same usage charges, in addition to the daily roamer fee. However, only MCI's roamer proposal is not linked to the creation of some hypothetical nationwide registration system. Accordingly, MCI will be accorded a slight preference for its roamer service proposal on the basis of its commitment to provide roamer service during the first year of operation in Pittsburgh regardless of the state of intersystem registration.

61. The findings in this case summarized above, compel the conclusion that MCI has proposed a geographic area which most

closely identifies, resembles and meets the needs of the Pittsburgh Standard Metropolitan Statistical Area. In addition, it is concluded that MCI has proposed an initial system which best accommodates anticipated demand for local and roamer service. Accordingly, a substantial comparative preference is accorded to MCI under this issue.

### *Issue (b)*

62. *Expansion Plans*. This issue requires a comparison of each applicant's proposal for expanding its system capacity in a coordinated manner within the CGSA in order to meet anticipated increasing demand for local and roamer service. The *Designation Order* states that in making this comparison preference should be given to designs entailing efficient frequency use, including not only the applicant's plans with regard to cell-splitting and additional channels, but also the degree of frequency reuse the system will be capable of and the applicant's ability to coordinate the use of channels with adjacent or nearby cellular systems.[24]

63. Despite its theoretically sound system expansion plans, there is evidence in the record to suggest that CMS' system would require significant fine-tuning before implementation of its expansion plans would be possible. The record indicates that CMS' frequency plan is designed for a highly sectorized system while its engineering parameter tables reflect an essentially omnidirectional system. In view of this fact, no comparative advantage can be accorded CMS on the basis of its expansion plans. Both MCI and Celcom have presented general plans which would allow for expansion of their respective systems in a coordinated manner. Both proposals demonstrate an understanding of cellular design principles and reflect *bona fide* cellular systems and expansion plans. Neither proposal violates either co-channel or adjacent channel reuse criteria and both have assigned their frequency sets in accordance with a standard 7-cell reuse pattern. Additionally, each proposal allows the applicants a high degree of flexibility so that their plans can be easily adapted to meet the particular needs of the SMSA with a minimum of costly engineering modifications. Neither plan, however, is set forth with sufficient particularity to warrant a preference on that basis alone. Celcom's phased-in system is, by its very nature, a smaller, more conservative system at the outset. Such a plan allows greater flexibility for growth and adjustment as facts about the SMSA become known. Celcom will commence operation at less than maximum power at most base stations, and initially expand its 39 dBu contours by increasing power. As noted, however, Celcom is likely to experience a degradation of service as it expands its system.

---

[24] See, *Designation Order*, para. 16(b), note 13, and *Report and Order*, 86 FCC 2d, at 503.

MCI has also planned a more conservative system than CMS' at the outset. Although it has initially configured its system to meet demand through the second year of operation in order to guarantee that any unanticipated first year demand is met without problem or initiation of expansion plans, MCI's initial proposal permits the addition of channels to meet increased demand. Thus, MCI as is the case with Celcom, can avoid the more expensive and complex procedures of cell-splitting and sectorization in the initial stages of expansion.

64. The distinguishing element between Celcom's and MCI's proposal and the one which is the basis for MCI's preference under this issue is its proposal for evaluating and monitoring system traffic congestion. Although CMS proposes to monitor its system performance continuously, it will wait for significant congestion to occur for specified periods of time before taking action to reduce blocking. For example, although CMS' design GOS is 0.01, it will allow its GOS to deteriorate to 0.05 for a specified period before taking action. Celcom is silent on the frequency of its evaluation or the actual corrective steps to be taken, but it, too, will permit significant congestion for a specified period before taking action. MCI, however, proposes to monitor traffic continuously and to anticipate system congestion rather than waiting until demand reaches or exceeds design levels for specified periods of time.

65. Thus, it is concluded that as between the three applicants, MCI has proposed a plan for system expansion which reflects the best understanding of cellular design principles and principles of expansion.

### *Issue (c)*

66. Pursuant to this issue, a determination must be made on a comparative basis of the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities). In its *Report and Order*, 86 FCC 2d at 503, the Commission explained that while they are relevant, these areas of comparison will be generally less significant than those contemplated under issues (a) and (b). Specifically, the Commission noted that the adequacy of base station and switching facilities and related maintenance proposals may be an issue in comparative proceedings in some cases, but it is not expected that this will be a significant issue in general. The Commission also noted that personnel and practices will be significant only to the extent that they affect an applicant's ability to implement its proposal.

67. *Rates, Charges, Practices and Classifications*. The record herein supports the conclusion that CMS is entitled to a comparative preference for its proposed service offerings and rates and charges. CMS' proposed rates structure (including its provisions for off-peak

and special data transmission pricing) will result in more efficient and more economical cellular usage than those rates proposed by either MCI or Celcom.

68. CMS' proposed monthly access charge of $4.95 is $10.00 less than MCI's and $35.00 less than Celcom's proposal (although Celcom's monthly access charge includes 100 message units).[25] It should be noted, however, that in view of the fact that none of the parties adequately describes the methodology used to arrive at its proposed rates and, in keeping with applicable precedent,[26] CMS' preference here is not based on its lower rates but is, in fact, based on its rate structure which will best enhance development and use of cellular resources. CMS' usage charges will encourage efficient subscriber use of the cellular spectrum during off-peak hours by use of price differentials and usage time gradations for billing each call. Although all three applicants provide significant price differentials for peak/off-peak voice usage, CMS also proposes to offer data services to utilize capacity available off-peak.

69. Another factor affecting system usage and accompanying usage charges is the billing time unit used to determine actual billed time. For example, for a call lasting less than 1 minute, are users paying usage fees calculated to the nearest minute, ½ minute or 1;10 minute? The larger the time gradations used in billing a call, the greater proportional difference between the billed time charged the subscriber and the actual airtime used. At least in the initial stages of cellular development, it is desirable to minimize the incentive to subscribers to extend airtime used per call beyond that time actually needed to complete the communication. This is best accomplished by a time gradation which most closely results in billed time for actual time used. As among the three applicants in this proceeding, CMS' proposal (initial ½ minute and six second gradations thereafter) comes closest to achieving this goal.

70. Celcom and MCI argue that CMS' rate proposal is unrealistically low and that a comparative demerit should accrue to CMS as a result. The parties argue that, given these unrealistically low rates, CMS will be unable to survive economically should its unusually high usage projections fail to materialize.[27] This argument is not persuasive. First, it must be recognized that cellular service is in its infancy and for a limited time at least, a low access charge may promote development of the service. A proposal such as Celcom's

---

[25] As the findings indicate (paragraph 37), these charges are for access only and do not reflect the cost of additional service features, message unit charges (other than the first 100 message units for Celcom's proposal) or equipment rental costs.

[26] See, *Houston Mobilfone, Inc.*, 65 FCC 2d 848, 858–859 (Rev. Bd. 1977), reversed on other grounds, *sub. nom. Mobilfone Services* v. *F.C.C.*, 605 F.2d 572 (D.C. Cir. 1979).

[27] It is noted that CMS' demand projections do not include an adjustment considering the effect of a wireline carrier competing in the Pittsburgh SMSA.

bundled proposal (a high access charge to include the first 100 message units) would, at this stage, be resource inefficient in that by bundling cellular access and usage, all subscribers would pay the same fee regardless of actual usage needs or costs of providing service. In addition, such bundled costs could encourage indiscriminate use of the system during its initial developmental stages, resulting in artificially induced system congestion.[28] Finally, in the absence of evidence in the record that CMS' rates are, in fact, unrealistic, no comparative demerit in this regard can be forthcoming.[29]

71. *Maintenance, Personnel and Facilities.* As indicated above, the Commission has determined that, for comparative purposes, personnel proposals will be significant to the extent that they affect an applicant's ability to implement its proposal. All three applicants have established an organizational management structure for their proposed systems; all rely to some extent upon the expertise or personnel resources of their corporate parents and, in addition, MCI and CMS would seek comparative preference on the basis of their vast communications experience. No preference, however, will be awarded to any of the applicants on the basis of their personnel proposals. None of the staffing and personnel proposals presented by the parties is flawless or likely to so clearly enhance an applicant's ability to implement its proposal that a preference must result. CMS, for example, has proposed a staff of 61 employees for its Pittsburgh system, but has failed to disclose details concerning the composition of the staff or their functions (beyond the upper level managerial level). Nor has MCI provided sufficient information concerning its Pittsburgh staff to warrant a preference. Celcom's staffing proposal also lacks specificity concerning employee functions.

72. Each applicant's maintenance proposal is subject to the same defect. All three applicants have presented maintenance proposals which are theoretically acceptable, but vague and incomplete in parts. All propose redundant systems, continuous system monitoring and routine maintenance. There is, however, no persuasive record evidence on which to conclude that one proposal is significantly superior to the others. Accordingly, no comparative preference will inure to any party on the basis of its maintenance proposal.

73. Finally, no comparative preference will be accorded as a result of the facilities proposed by any of the applicants (including switching capabilities). All three applicants have proposed technically acceptable facilities and the record clearly reflects the ability of all three to construct cellular systems technically capable of providing high quality cellular service.

---

[28] This would be of particular consequence to Celcom since it plans to phase in its initial system during the first year on the basis of actual demand.

[29] See *Houston Mobilfone, supra* at p. 859.

## *Ultimate Conclusion*

74. MCI has received a substantial comparative preference under issue (a) for its proposed geographic area and population, as well as its identification of, and ability to accommodate anticipated demand for service. MCI has also been awarded a comparative preference under issue (b) for its proposal concerning system expansion. Although CMS has received a comparative preference on the basis of its proposed rates and charges, this preference does not outweigh the substantial preferences accorded to MCI under issues (a) and (b). Thus, based on a review of all of the comparative criteria and the comparative preferences awarded in this proceeding, it is concluded that, on a comparative basis, MCI's application is superior to both Celcom's and CMS' and that the public interest, convenience and necessity will be better served by a grant of MCI's application and a denial of the applications of both Celcom and CMS.

Accordingly, IT IS ORDERED, that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion,[30] the application of MCI Cellular Telephone Company for a construction permit to establish a new cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Pittsburgh, Pennsylvania, modified Standard Metropolitan Statistical Area, IS GRANTED, and the applications of Celcom Communications Corporation of Pittsburgh and Cellular Mobile Systems of Pennsylvania, Inc. ARE DENIED.

IT IS FURTHER ORDERED that the grant to MCI is conditioned upon its obtaining the appropriate antenna structure clearances.

FEDERAL COMMUNICATIONS COMMISSION
LENORE G. EHRIG, *Chief Administrative Law Judge*

---

[30] Pursuant to the *Designation Order*, exceptions to this Initial Decision, under Section 1.276 of the Commission's Rules, shall be taken directly to the Commission. In the event that exceptions are not filed within 30 days after the release date of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to section 1.276(c).

Application, Dismissal of
Interlocutory Ruling, Appeal From
Ownership, Multiple

Review Board granted appeal from ALJ's ruling dismissing appellant's application. Application dismissed because one of applicant's principals, a limited partner, had acquired an ownership interest in a seventh television CP, the maximum number permitted under Commission rules. Board found that limited partnership interest, if adequately insulated, would not violate multiple ownership rules. Proceeding remanded to explore control question.
–*Metro Broadcasting, Inc.*
MM Docket No. 83–140

FCC 84R-5

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| In re Applications of | |
|---|---|
| METRO BROADCASTING, INC.<br>Orlando, Florida | MM Docket No. 83–140<br>File No. BPCT-820707KE |
| Harry D. Calhoun, et al, d/b/a<br>ORLANDO FAMILY TELEVISION, LTD.<br>Orlando, Florida | MM Docket No. 83–141<br>File No. BPCT-820907KK |
| RAINBOW BROADCASTING COMPANY<br>Orlando, Florida | MM Docket No. 83–142<br>File No. BPCT-820909KF |
| WINTER PARK COMMUNICATIONS<br>Winter Park, Florida | MM Docket No. 83–143<br>File No. BPCT-820909KV |
| For Construction Permit | |

## MEMORANDUM OPINION AND ORDER

(Adopted: January 16, 1984; Released: January 23, 1984)

BY THE REVIEW BOARD: Board Member Blumenthal absent.

1. On November 22, 1983, Orlando Family Television, Ltd. appealed from a ruling by Administrative Law Judge Walter C. Miller dismissing its application in this case. Orlando's application was dismissed, pursuant to a motion filed by a competing applicant, Rainbow Broadcasting Company, because David Vaughan, a 20% limited partner in Orlando, had recently acquired an ownership interest in a seventh television construction permit, the maximum number permitted under Commission rules, and a grant of Orlando's application would therefore have violated the Commission's multiple ownership rules. *See* Section 73.636(a)(2) of the Commission's Rules, 47 CFR 73.636(a)(2); *see* also Section 73.3518, 47 CFR 73.3518 on inconsistent or conflicting applications. FCC 83M-4227, released November 15, 1983; reaffirmed FCC 83M-4235, released November 16, 1983. Orlando's appeal is accompanied by a motion for leave to amend reflecting that Vaughan has now conveyed his interest in Orlando to his daughter, previously a 10% limited partner in Orlando. The competing applicants,—Metro Broadcasting, Inc., Winter Park Communications, and Rainbow—all oppose the appeal and the motion for leave to amend. An Initial Decision was subsequently issued in this proceeding. FCC 83D-69, released December 21, 1983. On the limited record before us, we can not affirm the dismissal of Orlando's application.

2. Orlando acknowledges that Vaughan possesses an ownership interest in seven television stations but contends that his partnership interest in Orlando is not cognizable under the Commission's multiple ownership rules. Alternatively, Orlando relies on its amendment that would remove Vaughan as a limited partner. Rainbow and Metro respond that the hearing testimony reflects that Vaughan's partnership interest is "limited" in name only, citing Tr. 915, 928–29, 932, 1145. They argue that even assuming, *arguendo*, that there is authority that the multiple ownership rules are not applicable to limited partnership interests, Vaughan's actual working control over Orlando is sufficient to trigger the applicability of those rules. Finally, the competing applicants oppose the motion for leave to amend arguing that Orlando has not demonstrated good cause for acceptance of the amendment.

3. Although the Commission's multiple ownership rules prohibit the grant of a television permit to an applicant whose principals already have a direct or indirect interest in seven television broadcast stations, *see* 47 CFR 73.636(a)(2), the notes explaining that rule and recent precedent define cognizable ownership interests in terms of voting rights or control. Thus, ownership interests that would appear to violate the literal terms of the multiple ownership rules are permitted where such interests are sufficiently insulated from station operation to preclude the likelihood of *meaningful control* or influence over station management. *See Evening Star Broadcasting Co.*, 67 FCC 2d 318, 324, 42 RR 2d 117, 125; *reaff'd as*

*mod.* (on other grounds) 68 FCC 2d 158, 42 RR 2d 729 (1978) "[O]wnership of preferred stock will not invoke the strictures of the multiple ownership rules absent contingent control rights." *Cleveland Television Corp.*, 91 FCC 2d 1129, 52 RR 2d 581 (Rev. Bd. 1982), *review den.*, FCC 83–235, released May 18, 1983 (preferred stock ownership involved insufficient incidents of contingent control to violate multiple ownership rules). While these precedents do not expressly address the issue presented here, *i.e.*, whether limited partner's ownership interests, as distinct from those of preferred stockholders, are cognizable under the multiple ownership rules, we may reasonably infer from them that such interests, if adequately insulated, will not trigger the application of the multiple ownership rules, especially since the Commission generally recognizes the exclusive authority of general partners to manage and control partnership affairs, *see Greater Williamette Vision, Ltd.*, 50 RR 2d 1367, 1369 (1982), and in other areas, treats limited partners and non-voting preferred shareholders alike. *Compare Bradley, Hand and Triplett*, 89 FCC 2d 659, 51 RR 2d 383 (Rev. Bd. 1982) *with Central Texas Broadcasting Co. Ltd.*, 90 FCC 2d 583, 51 RR 2d 1478 (Rev. Bd. 1982) (integration of ownership and management criterion under standard comparative issue).

4. However, in the instant case, there is insufficient information before the Board to evaluate whether Vaughan in fact holds a passive, non-voting, non-control ownership interest as asserted by Orlando and contested by opponents. Remand of the proceeding is therefore necessary to permit full exploration of the control question. We will also dismiss Orlando's motion for leave to amend with leave to refile it before the ALJ. In this way, allegations by opponents to the amendment that the proposed transfer would not produce any real change in the ownership of Orlando may also be explored. It is more appropriate that the amendment be reviewed in the first instance before the ALJ where all relevant factors can be fully developed.

5. ACCORDINGLY, IT IS ORDERED, That the Appeal of Orlando Family Television, Ltd. from Presiding Officer's Interlocutory Rulings, filed November 22, 1983, by Orlando Family Television, Ltd. IS GRANTED; and

6. IT IS FURTHER ORDERED, That the Motion for Leave to File Appeal Greater Than Five Typewritten Pages in Length, filed November 22, 1983, by Orlando Family Television, Ltd. IS GRANTED; that the motion for Leave to Amend, filed November 22, 1983, by Orlando Family Television, Ltd. IS DISMISSED; and that this proceeding (including the Initial Decision FCC 83D-69) IS REMANDED to the presiding Administrative Law Judge for further action in accordance with this opinion and for the preparation of such

Supplemental Initial Decision as may be warranted by a supplemental record.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

FCC 83D-69

**BEFORE THE**

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| METRO BROADCASTING, INC.<br>Orlando, Florida | MM Docket No. 83-140<br>File No. BPCT-820707KE |
| RAINBOW BROADCASTING COMPANY<br>Orlando, Florida | MM Docket No. 83-142<br>File No. BPCT-820909KF |
| WINTER PARK COMMUNICATIONS<br>Winter Park, Florida | MM Docket No. 83-143<br>File No. BPCT-820909KV |
| For Construction Permit | |

## *Appearances*

*John H. Midlen, Jr.* on behalf of Metro Broadcasting, Inc.; *James R. Bayes*, *Antoinette D. Cook* and *Barry D. Wood* on behalf of Rainbow Broadcasting Company; *Robert J. Buenzle* and *Edwin N. Lavergne* on behalf of Winter Park Communications; and *Paulette Laden* on behalf of Chief, Mass Media Bureau, Federal Communications Commission.

# INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

(Issued: December 14, 1983; Released: December 21, 1983)

## *Preliminary Statement*

1. Three applicants remain in this UHF television proceeding.[1] Metro Broadcasting, Inc. (Metro) and Rainbow Broadcasting Company (Rainbow) each seek authority to construct and operate a new commercial television station on Channel 65 in Orlando, Florida. Winter Park Communications (Winter Park) seeks the same authority for adjacent Winter Park, Florida.

2. The case was designated for hearing on March 9, 1983 (48 F.R. 10917 published March 15, 1983). After the interlocutory pleading

---

[1] A fourth application, Orlando Family Television, Ltd.'s application was dismissed on November 15, 1983. See FCC 83M-4227 released November 15, 1983; FCC 83M-4235 released November 16, 1983; and FCC 83M-4253 released November 17, 1983.

cycle had run its course, the following issues remained for resolution:[2]

> (1) To determine the facts and circumstances surrounding the integration proposal Rainbow Broadcasting prepared and filed on April 1, 1983; whether that proposal contained misrepresentations or was lacking in candor; and, if so, what effect those misrepresentations or lack of candor have on Rainbow's basic and/or comparative qualifications to be a Commission licensee;
>
> (2) To determine the areas and populations that would receive Grade B or better service from the proposals and the availability of other Grade B services to such areas and populations;
>
> (3) To determine, in light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would best provide a fair, efficient and equitable distribution of broadcast service;
>
> (4) In the event it is concluded from Issue 3 above, that a choice among applicants should not be based solely on considerations relating to Section 307(b), to determine which of the proposals, on a comparative basis, would best serve the public interest; and
>
> (5) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.[3]

3. Prehearing Conferences were held on May 13, June 1 and June 15, 1983. Hearing sessions were held on August 22 through 26, 1983 and on September 9, 1983. The record was ultimately closed on October 25, 1983. See FCC 83M-3836 and FCC 83M-3845, both released on October 25, 1983.

4. The three applicants, as well as the Mass Media Bureau, filed their Proposed Findings of Fact and Conclusions of Law on October 24, 1983. The Mass Media Bureau filed Reply Findings on October 31, 1983; Rainbow and Metro filed theirs on November 4th; and Winter Park filed its Reply Findings on November 7, 1983.

## *Findings of Fact*

### *Issue 1 - Rainbow's Misrepresentation Issue*

5. On June 14, 1982, Trefoil Broadcasting Company, Inc. (Trefoil) filed a UHF application for Channel 29, Sacramento, California. Trefoil was the first of 12 applicants to file for that channel. See 48 F.R. 7496 published February 22, 1983.

6. The following month, on July 7, 1982, Metro Broadcasting, Inc. (Metro) filed a UHF application for Channel 65, Orlando,

---

[2] The issues have been renumbered so that the basic qualifying issue is set out first, the 307(b) type issues second, followed by the contingent standard comparative issue.

[3] The Chief, Mass Media Bureau phrased this ultimate issue somewhat awkwardly. Since the three applications are mutually-exclusive only one of them can be granted. So the issue should have been phrased in the singular; i.e. "which application should be granted" instead of the plural.

Florida. Metro was the first of four applicants to file for that channel. See 48 F.R. 10917 published March 15, 1983.

7. A short time later, two people - Joseph Rey and Leticia Jaramillo - decided that they would file competing applications for both Channel 29, Sacramento, and Channel 65, Orlando. They agreed to file for Sacramento under the name of El Dorado Television Company (El Dorado). Leticia Jaramillo was to own 90% of El Dorado and Rey was to own the other 10%. On August 24, 1982, they filed their application with the Commission for Sacramento and represented to the Commission that El Dorado Television Company was a partnership.[4]

8. Jaramillo and Rey agreed to file for Orlando under the name of Rainbow Broadcasting Company. Here the ownership role was to be almost the reverse. Rey was to own 85% and Jaramillo 10%. A little over two weeks after they had filed their Sacramento application - on September 9, 1982 - they filed their Orlando application and represented that Rainbow Broadcasting Company was a partnership.[5]

9. At the time Jaramillo and Rey filed their competing applications they were aware that integration of ownership with management is important in terms of winning a construction permit. They had the incentive to submit the strongest integration proposal possible in order to maximize the chances of success (Tr. 695–698, 700, 761, 808). And, as of September 9, 1982, Rey and Jaramillo also knew that they faced comparative hearings in two separate markets located at opposite ends of the country; and that therefore they would have to have two integration proposals - one for each market (Tr. 673).

10. The Sacramento proceeding was designated for hearing on February 8, 1983 (48 F.R. 7496 published February 22, 1983). The Orlando hearing was designated about a month later - on March 9, 1983 (48 F.R. 10917 published March 15, 1983).

11. On March 22, 1983, in this Orlando proceeding, Rainbow was ordered to "serve on each other and the Presiding Officer, a full, complete and definite description of [its] integration proposal, identifying the principals who are to devote 20 hours or more each week to the day-to-day operation of the proposed station, the positions to be held, and the duties to be performed."

12. Rainbow purported to comply with that directive on April 1, 1983. There it represented that "Each of the partners in the applicant will serve in a management position and will devote a

---

[4] No legal partnership was ever formed.

[5] No legal partnership in Rainbow was formed until the hearing in this case was under way. It was only after one of Rainbow's principals was cross-examined on the subject that the three principals entered into a partnership agreement. See Rainbow Ex. 6, Tr. 621–622, 640–641 and 824.

minimum of forty hours per week to the operation of the station." Rainbow further represented that Rey will be the General Manager and will assume the overall responsibility for the day-to-day operation of the station; and that Ms. Jaramillo will serve as the Program Manager, will determine the day-to-day flow of programs and scheduling, and will work with local production companies and community groups.

13. At this juncture note that Rainbow placed no caveats on its full-time integration claim for Mr. Rey and Ms. Jaramillo. Nor did it even mention their Sacramento application and the integration proposal they would have to submit there (W.P. Special Issue Exhibit 3).

14. Two weeks later, on April 15, 1983, a prehearing conference was held in the Sacramento proceeding. There Judge Edward Kuhlmann ordered El Dorado to file a full integration pledge for its Sacramento application by April 28, 1983. Rey was informed of that obligation on April 17, 1983.

15. Late on the afternoon of April 27, 1983, Rainbow's counsel made a frantic phone call to Rey. Counsel indicated that El Dorado's Sacramento integration proposal had to be filed with Judge Kuhlmann the following day. Rey - the 10% owner - attempted to contact Jaramillo - the 90% owner. He was unsuccessful. So Rey himself prepared the El Dorado integration proposal, and filed it with Judge Kuhlmann without the 90% owner's consent.

16. There El Dorado referred to the fact that Rey and Jaramillo were principals in Rainbow's Orlando application. It then made the following representations (W.P. Special Exhibit No. 1):

> "They (Jaramillo and Rey) have each made a commitment to spend at least forty hours per week at the Orlando station if Rainbow's application is granted. *For Mr. Rey, that commitment takes precedence over his proposed fulltime involvement in the Sacramento station.* However, if Rainbow is not awarded the construction permit for the Orlando television station, both partners in El Dorado Television Company will serve in management positions and will devote a minimum of forty hours a week to the operation of the proposed station in Sacramento, California." (Underlining added.)
>
> "Leticia Jaramillo, the 90 percent partner in El Dorado Television Company, will move to Sacramento and will serve as the general manager of the Sacramento station. In that position, she will be responsible for the day-to-day operation of the station, including decisions involving broadcast standards and personnel matters. In addition, she will supervise . . . *should the Orlando application be granted prior to, or within three years following the initiation of the operation of the Sacramento station, Ms. Jaramillo will transfer her interest in Rainbow Broadcasting Company to Joseph Rey, and will have no management role at the Orlando facility.*" (Underlining added.)
>
> ". . .
>
> When and if Rainbow Broadcasting Company is granted a construction permit for the television station in Orlando, Florida, Joseph Rey will divest his interest in El Dorado Television Company, leaving Leticia Jaramillo the sole owner of El Dorado.

. . ."

17. Shortly after the El Dorado integration statement was filed with Judge Kuhlmann, Leticia Jaramillo had an opportunity to review that proposal. She approved those representations after the fact, although she noted that the El Dorado statement did seem inconsistent with the previous Orlando statement (Tr. 702–703).[6]

18. At the hearing Rey and Jaramillo attempted to justify their inconsistent statement to Judge Kuhlmann on the ground that they intended to dismiss their Sacramento application anyway. Stated another way, Rey and Jaramillo took the position that the misrepresentation was made to Judge Kuhlmann and not to the Orlando Presiding Officer, but that it was all right to be less than candid with Judge Kuhlmann, since they intended to dismiss the Sacramento application in any event. This position is rejected.[7] [8]

### *Issue 2 - Areas and Populations*[9]

19. As proposed Rainbow would serve 1,476,047 people over 8,105 square miles; Metro would serve 1,443,470 people over 7,598 square miles; while Winter Park would cover 1,116,211 people and 5,893 square miles. See Joint Engineering Ex. 2 and W.P. Ex. 10.

20. There are no areas where any applicant will provide either a first, second, or third service. However, the following Table shows the areas and populations which would receive fourth and fifth television service from each proposal. See Joint Engineering Ex. 2, p. 11.

*Table*

| *APPLICANT* | *FOURTH SERVICE* | | *FIFTH SERVICE* | |
|---|---|---|---|---|
| | SQ. MI. | POP. | SQ. MI. | POP. |
| Rainbow | 247 | 5,323 | 1,190 | 239,148 |
| Metro | 196 | 4,747 | 1,095 | 238,764 |
| Winter Park | 0 | 3d 0 | 510 | 103,395 |

---

[6] Rainbow Broadcasting also became aware that the Orlando and El Dorado integration statements were inconsistent. On April 28, 1983; i.e., the day it presented its Sacramento integration proposal to Judge Kuhlmann, it petitioned for leave to amend its Orlando application; and in that Petition, Rainbow's counsel tried to modify his previous unequivocal Orlando integration statement. See W.P. Special Issue Exhibit 2.

[7] Joseph Rey is well aware that he has been less than candid with the Commission on a relevant decisional factor, and that that lack of candor could be weighed against him in this proceeding. At Tr. 812–813, he said in part: ". . .I am not a lawyer, and I realize that a lot of little minor details have been made into mountains in this proceeding, *and I think I will learn for next time. . .*" (underlining added)

[8] Even though Rey and Jaramillo intended to dismiss their Sacramento application, they still had an incentive to file the strongest integration proposal possible in that case; for the stronger the integration proposal the greater the chance of a higher pay-off.

[9] The facts adduced under this issue are also relevant to the 307(b) issue *infra.*

21. In terms of total areas and populations, Rainbow has a slight edge on Metro with Winter Park trailing substantially. The same holds true for coverage to underserved areas. Here the edge that runner-up Metro has on Winter Park becomes significant. All-in-all Rainbow should be given a slight preference over Metro, and both Rainbow and Metro should be given a comparative coverage preference over Winter Park.

### *Issue 3 - The 47 USC 307(b) Issue*

22. Metro and Rainbow propose Orlando, Florida as their community of license. Winter Park proposes Winter Park, Florida as its community.

23. *Orlando.* Orlando Florida (1980 population 127,662) is located in east central Florida and occupies 45 square miles. At the junction of several major highways; i.e., U.S. 441 (Orange Blossom Highway), Interstate 4, U.S. 17/92 and SR-50, it is served by 2 major nationwide bus lines, a railroad, several motor and freight carriers, and the Orlando International Airport. The Airport handles 400 flights a day from 22 airports. The city has grown from 99,006 people in 1970 to its present population of 127,662. The Orange-Seminole-Osceola Transportation Authority (OSOTA) provides local bus service to Orlando and its environs.

24. The proximity of Disney World and numerous beaches make Orlando a major tourist center. About 6–8 million tourists visited the Orlando Metropolitan Statistical Area (population 700,055) last year.[10] The major employers in Orlando are the Naval Training Base (16,000 employees), the City of Orlando (3,260 employees), the Florida Hospital (3,000 employees), Sunbank NA (2,453), and the Regional Medical Center (3,200). In addition, the State of Florida has 5,500 employees in Orlando and the Orange County government has 3,500 employees there. All-in-all Orlando has a labor force of about 70,000 people. The mean income for Orlando is $16,110.

25. Orlando has its own mayor and city council. About 32% of its population of 127,662 is non-white; 3.9% is Spanish, and 30% is Black. It has a major daily newspaper - the *Orlando Sentinel* which has a nine-county circulation market of over 200,000. In addition, Orlando has four weekly newspapers - two of which are oriented towards Orlando's black population. 34% of Orlando's residents are college graduates and 13% of them are over the age of 65.

26. There are twelve Am and FM radio stations licensed to Orlando,[11] and four television stations.[12] This means that if either

---

[10] The Orlando MSA consists of Orange, Seminole, and Osceola counties.

[11] The aural broadcast stations are: WDBO (AM/FM), WDIZ (FM), WGAG (FM), WHOO (AM/FM), WKIS (AM), WLOF (AM), WBJW (FM), WMFE (FM), WORL (FM), and WUCF (FM).

[12] The four television stations are: WCPX-TV, WFTV, WMFE-TV, and WOFL.

Metro or Rainbow are granted they would bring a fifth local television transmission outlet to Orlando.

27. *Winter Park*. Winter Park (1980 population - 22,339) occupies 8 square miles and is an integral part of the Orlando urbanized area. The distance from the center of Winter Park to the center of Orlando is less than five miles. The southern boundary of of Winter Park adjoins Orlando. OSCOTA (para. 23) provides local bus service to Winter Park and it is conveniently located within easy reach of the Orlando International Airport. Winter Park has grown from 21,895 people in 1970 to its present population of 22,339.

28. Winter Park has a labor force of about 12,000 people. The major employers are banks, insurance companies, law firms, health care services, engineering and architectural firms, and restaurants. The mean income for Winter Park is $20,990.

29. It has its own mayor and city council. 14.3% of its population of 22,339 are Black and 1.7% is Spanish. The *Sun-Herald-Outlook*, a weekly newspaper, is published in Winter Park, and the *Orlando Sentinel* has a separate subsection called the *Little Sentinel* that focuses on Winter Park. 56% of Winter Park's residents are college graduates, and 22% of them are over the age of 65.

30. There are four AM and FM radio stations licensed to Winter Park.[13] Winter Park has no television assigned to it. This means that if Winter Park Communications were granted, it would bring a first local television transmission outlet to Winter Park.

### *Issue 4 - The Contingent Standard Comparative Issue*

31. *Description of the Applicants - Metro Broadcasting, Inc.* Metro is a Florida corporation with nine stockholders, and two classes of stock; i.e., Class A and Class B stock. Class A is voting common stock, while Class B is non-voting common stock. The holders of Metro's Class A stock hold a 56.1% equity in the corporation. The Class B stockholders hold the other 43.9% equity. The Corporation has issued 5,611 shares of Class A stock and 4,390 shares of Class B stock. The following table sets out Metro's corporate structure:

*Table*

| *Stockholder* | *Office* | *Director* | *Class of Stock* | *Number of Shares* |
|---|---|---|---|---|
| Arthur E. Grindle | President | Yes | A | 1,111 |
| James W. Hickman | Vice-President | Yes | A | 1,111 |
| William C. Coleman | Secretary | Yes | A | 1,111 |
| David Peoples | Treasurer | Yes | A | 1,111 |

---

[13] The aural broadcast stations are: WLOQ (FM), WPFL (FM), WPRK (FM), and WAJL (AM).

*Table*

| *Stockholder* | *Office* | *Director* | *Class of Stock* | *Number of Shares* |
|---|---|---|---|---|
| Elmer N. Lincoln | Vice-President | Yes | A | 1,111 |
| Jay Schenck | None | No | A | 56 |
| | | | B | 1,054 |
| J. Charles Gray | None | No | B | 1,112 |
| Joel McKinnon | None | No | B | 1,112 |
| Thomas Prince | None | No | B | 1,112 |

32. *Rainbow Broadcasting Company*. Rainbow is a belatedly organized general partnership (see Footnote 5 *supra*). It is composed of Joseph Rey who owns an 85% interest, Leticia Jaramillo who owns 10% and Esperanza Rey-Mehr, who owns 5%.

33. *Winter Park Communications*. Winter Park is a corporation with five stockholders. The following Table sets out Winter Park's corporate structure.

*Table*

| *Stockholder* | *Office* | *Director* | *Percentage of Stock Ownership* |
|---|---|---|---|
| Hal H. Kantor | President | Yes | 10% |
| John F. Lowndes | Vice-President Secretary, and Treasurer | Yes | 40% |
| Hector Alcade | Vice-President | Yes | 20% |
| Lester Mandell | None | Yes | 20% |
| James E. Russell | None | Yes | 10% |

34. *Diversification of Mass Media*. Metro Broadcasting, Inc. has no ownership or other interest in or connection with any medium of mass communications. None of Metro's stockholders have any such ownership or interest except for Jay Schenck. Schenck owns about 1,700 shares of Preferred B stock in Time, Inc. That stock carries no voting rights. As of June 30, 1983, there were 3,282,594 outstanding shares of Preferred B stock in Time, Inc.

35. Neither Rainbow nor any of its partners has any other interest in or connection with any other medium of mass communications. The same holds true for Winter Park and its stockholders.

36. *Integration of Ownership With Management - Metro*. While Metro only intends to integrate five of its nine stockholders into its day-to-day management, it lays claim to 99% integration. In bases this claim on the fact that the 5 stockholders who own 99% of the voting stock will be integrated into the proposed day-to-day operation of the station.

37. *Arthur Grindle*. Metro will fully integrate Arthur Grindle into the proposed station's day-to-day operation. Grindle owns 19.8% of Metro's voting stock, is Metro's President, and a corporate Director, and will be the station's General Manager. As General Manager, Grindle will be responsible for the overall functioning of

the television station, and will supervise all aspects of corporate operation.

38. Arthur Gindle presently resides in Altamonte Springs, Florida. He has lived there since 1968. Between 1948 and 1980, Grindle was in the business of selling automobiles. He held automobile dealerships in Illinois, Texas, Ohio, and Michigan before coming to Florida in 1968. Since coming to Florida, Grindle has held automobile dealerships in Jacksonville (1968–1971), in Stanford and Apopka, Florida (1973), Winter Park (1977), and South Orlando (1978). His Stanford, Apopka, Winter Park and South Orlando dealerships are known as the "Wheel Ranches" in the Orlando area.

39. Grindle holds a Doctor of Philosophy in Small Business from Sussex College of Technology, Sussex, England, and a Master of Science in management from Rollins College, Winter Park, Florida. From 1974–1981 he served as an Adjunct Professor in Rollins' masters program.

40. In 1980, Grindle decided to become a politician. So he sold his son an interest in one of the Wheel Ranches and leased the other three properties. In 1982 he was elected to the Florida House of Representatives - a part-time position.[14] Grindle is on three subcommittes of the Legislature. He intends to run for reelection (Tr. 210–212, 215).

41. Grindle has extensive civic activities. He is the member of several Chambers of Commerce in the Orlando area. He has been a member of the Board of the March of Dimes, Orlando Chapter since 1974; a member of the Board of the Florida Symphony; and since 1980 a member of the Board of the Leukemia Society of America. He has been active in the United Cerebal Palsy Telethon since 1975 and hosted it in 1982. Over the last ten years Grindle has spoken on the subject of "Free Enterprise" in sixteen Orlando area high schools and one elementary school. He has received thirty-three awards from various charitable organizations, mostly in the greater Orlando area.

42. Grindle has some broadcast experience. Back in 1956, as an automobile dealer, he did his own television commercials on WGN-TV, Chicago, Illinois. He continued doing his own television commercials after he moved to Houston in 1961. While in Houston he hosted his own television show - "Comedy Theater".

43. Metro's opponents claim that Grindle will not be able to fulfill his 40-hour integration pledge. They argue that his duties as a Florida legislator when combined with his other business and civic activities will make it impossible for him to spend 40 hours a week in

---

[14] The Florida Legislature meets at least two months (April and May) out of each year, and it holds formal sessions at least two to three days a week during those months. Subcommittee meetings are generally held on the remaining days of the week. Committees are held in the Fall and Winter, usually in Tallahassee (Tr. 126–128).

the day-to-day operation of the station. Grindle, on the other hand, indicates that he will have no difficulty in fulfilling his forty hour per week commitment.

44. Grindle's testimony will be credited. Undoubtedly, it will be difficult for him to spend 40 hours per week at the station during the two months the legislature is in session in Tallahassee. But he has a pilot's license and owns his own airplane. He believes that this will help him meet his commitment.

45. *William C. Coleman, Jr.* Metro will fully integrate William Coleman, Jr. into the proposed station's day-to-day operation. Coleman owns 19.8% of Metro's voting stock, is Metro's Secretary and a corporate Director, and will be the Director of Programming and Operations. In that capacity he will supervise the Programming and Operations Department Staff, select the programming to be aired, negotiate contracts with program suppliers, establish the daily programming schedule, and supervise the entire production effort of the station.

46. Coleman has resided in Orlando since 1956. He holds a Bachelor of Science/Bachelor of Arts with a business major from Northwestern University, Evanston, Illinois, and a Master of Business Administration.

47. In 1953, Coleman founded Coleman Realtors in Winter Park Florida. Since that time he has been a realtor - appraiser. He has invested in, appraised, bought and sold commercial properties. Coleman is presently a partner, with his wife, in Coleman Realtors. He describes himself as being semi-retired (Tr. 301, 313).

48. Coleman has some broadcast experience. He started with radio station WORZ, where he hosted an hour-long program every week called "What's the Answer?" Later he was the moderator of a panel show for WDBO-TV, and the host for a public affairs program for WLLF-TV.

49. From 1977 to 1982, Coleman served as the Vice-Chairman of the Orlando Zoning Board of Adjustment, and since that time has been its Chairman. He has been a Trustee for the Leukemia Society since 1980; a member of the Board of Directors and President of PESCO (an organization that raises funds for art and cultural organizations); and a member of the Board of Directors of Central Florida Crime Line. He has been a member of the Orlando Jaycees since 1954.

50. *James W. Hickman.* Metro will fully integrate James W. Hickman into the station's day-to-day operations. Hickman owns 19.8% of Metro's voting stock, is a Metro Vice-President and a corporate Director, and will be the proposed station's Director of Finance. In that capacity he will supervise and be responsible for all fiscal operations of the station.

51. Hickman resides in Longwood, Florida, about eleven miles

from Orlando. He has lived there since 1972. Before that he lived in Winter Park, Florida for twenty-five years.

52. He holds a Doctor of Dental Surgery from Emory. He is a retired Dentist and successful real estate developer. Hickman has been a member of the United States Chamber of Commerce since 1975, and a member of the Winter Park Chamber of Commerce for about 25 years. For the last two years, he has been a member of the Seminole County Board of Adjustment which handles zoning matters. Hickman has no broadcast experience.

53. *Elmer Neal Lincoln*. Metro will fully integrate Elmer Lincoln into its day-to-day operation. Lincoln owns 19.8% of Metro's voting stock, is a Vice-President and a corporate Director, and will be the proposed station's Director of Sales. In that capacity Lincoln will be responsible for the Sales Department. Initially he will personally handle national and regional sales. The local Sales Manager will report to Mr. Lincoln.

54. Lincoln is black. Although he lived in Longwood, Florida from 1975 to 1983, he presently resides in Ypsilanti, Michigan. He owns an automobile dealership in Belleville, Michigan. He will return to Orlando as Director of Sales if Metro's application is granted. He is already training someone to manage his car dealership. He has no broadcast experience.

55. *David L. Peoples*. Metro will fully integrate David L. Peoples into the proposed station's day-to-day operation. Peoples owns 19.8% of Metro's voting stock, is Metro's Treasurer and a corporate Director, and will be the station's Director of Public Affairs and Community Relations. In that capacity he will be responsible for determining the needs and problems of the station's service area, and selecting issues for the station's public affairs programming.

56. Peoples was born in St. Louis, Missouri, in 1931. In 1974 he came to Florida and resided in Casselberry, Florida - about 7½ miles from Orlando. From 1976 until August 1983 he lived in Longwood, Florida - about 11 miles from Orlando. He presently resides in Orlando.

57. In 1974, Peoples founded Southeastern Academy, Inc. in Kissimmee, Florida. The Academy trains prospective travel agents, airline reservation agents, ticket agents, car rental personnel and desk clerks. Five years later Peoples acquired Southern College in Orlando, Florida. Southern College offers "associate degrees" in secretarial sciences, interior design, business administration, fashion merchandising, computer programming, and dental assisting. Peoples is also the founder of Peoples Enterprises, Inc. which owns several diversified businesses in Kissimmee and Orlando. Mr. Peoples also holds 15% of the stock of First State Savings and Loan Association, which he values at over 1 million dollars.

58. Peoples is also a member and Chairman of the State Board of Independent Post Secondary Vocational, Technical, Trade and

Business Schools; a member of the National Affairs Committee of the National Home Study Council, and a member of its Board of Trustees; and President of the Florida Association of Private Schools. Since 1980, he has been Chairman of the National Affairs Committee, and is Vice-President of the National Home Study Council.

59. Peoples has been a member of the Osceola Chamber of Commerce since 1977 and a member of the "Committee of 100" of Osceola County. Peoples indicates that he will meet his proposed 40 hour commitment to Metro by turning over the active management of his enterprises and day-to-day management of his school to his sons. He has no broadcast experience.[15]

60. *Integration of Ownership With Management - Rainbow.* Rainbow proffered a 100% integration claim for its general partnership. It claimed that Joseph Rey (an 85% partner), Leticia Jaramillo (a 10% partner) and Esperanza Rey-Mehr (a 5% partner and Joseph Rey's mother) would be integrated into the day-to-day operation of the station. However, because Mrs. Jaramillo's integration promise proved untrustworthy and inconsistent with other integration proffers she has made, her 10% integration claim was stricken (Tr. 716–741).[16]

61. *Joseph Rey.* Rainbow will fully integrate its 85% general partner, Joseph Rey, into the day-to-day operations of the proposed station. Rey will be Rainbow's General Manager. In that capacity he will supervise the construction of the station and be directly responsible for its on-going operation. He will make the policy decisions involving broadcast standards and personnel matters, and will supervise the heads of the various station departments.

62. Joseph Rey is Hispanic. He was born in Havana, Cuba and lived there until he was eleven years old. Then in 1961, he came to the United States. He became a United States citizen in 1974. Rey is a graduate of Queens College, a division of City University of New York.

63. In 1973, shortly after he graduated from college, Rey became a sales trainee at Radio Station WINS in New York. He later became an account executive at WINS and then at Westinghouse Radio Advertising Representatives. In 1976, he became the New York Sales Manager for Buckley Radio Representatives. He also worked for a short time for Golden West's Major Market Radio in New York until 1978. He then moved to Miami to become National Sales Manager

---

[15] In addition to attacking Arthur Grindle's 40-hour per week integration pledge (see paras. 43–44 *supra*), Metro's opponents also attack the integration pledges of Hickman, Lincoln, Coleman, and Peoples. However, those attacks are even weaker than the unsuccessful Grindle complaint. As such, they are rejected.

[16] The rejection of Mrs. Jaramillo's integration pledge is completely independent of the findings that have been made under Rainbow's misrepresentation issue. See paras. 5–18 *supra*.

for Storer's WGBS/WLYF Radio. In 1980 he accepted the position of General Manager of WCMQ AM-FM, Miami.

64. In late August 1982, Rey became Vice-President/Sales of WDZL-TV, Miami. Rey will leave WDZL and move to Orlando if Rainbow is granted. He is not active in civic activities.

65. *Esperenza Rey-Mehr*. Rainbow intends to fully integrate Esperenza Rey-Mehr into its day-to-day operation. Rey-Mehr owns 5% of Rainbow and will purportedly be the station's Director of Hispanic Affairs. But she admits that she is "not a business woman"; that there had been no partnership meetings; and that she didn't know what the Hispanic population of Orlando is; what kind of programming Rainbow might broadcast if it receives the grant; and what the words "public affairs" means as that term appears in her exhibit. She doesn't know what the term "fairness doctrine" means or what a "talk show" is (Tr. 621–645).[17]

66. Mrs. Rey-Mehr was born and raised in Havana, Cuba. She arrived in the United States in 1961 and became a United States citizen in 1969. In 1955 she received a Ph.D. in Education from the University of Havana. She taught Junior High School in Havana and at the time she left Cuba she was a Junior High School principal.

67. From 1961–1966 she worked at various odd jobs. From 1966–1967 she taught Spanish at Highland Falls Junior High School. Then in 1968 she went to work for the New York City Department of Welfare as a case worker. In 1978, Mrs. Rey-Mehr retired from social work and moved to Orlando. She has no broadcast experience and is not active in civic affairs.

68. Metro contends that Rainbow shouldn't receive any quantitative credit for Mrs. Rey-Mehr's proposed 5% integration. While this contention is being rejected, it must be observed that the quality of her integration is nil. Outside of the fact that she is a Hispanic female, she brings absolutely nothing to Rainbow's application.

69. *Integration of Ownership With Management - Winter Park Communications*. Winter Park only intends to integrate one of its five stockholders into its day-to-day management, and that one stockholder is only being integrated on a part-time basis. Hal H. Kantor is the President, a Director, and a 10% stockholder of Winter Park. If Winter Park is granted, Kantor will be the station's proposed General Manager and devote at least 20 hours to the duties of that position.

70. Kantor was born in Chicago, Illinois and raised in Clarksdale, Mississippi. He received a Bachelor of Business Administration Degree from Tulane, a Masters of Degree in Business Administration

---

[17] Under the terms of the belated partnership that was entered into after this hearing was under way (see Footnote 5 *supra*), only Joseph Rey can terminate the partnership, and he can do so at any time and without any reason (Tr. 824; Rainbow Ex. 6).

at the University of California, Berkeley, and a Juris Doctor degree from Florida University.

71. In 1972 Kantor moved to Orlando where he associated with the law firm now known as Lowndes, Drosdick, Daster and Kantor. He is presently the Chairman of the Economic Development Task Force of the Greater Orlando Aviation Authority. The Task Force is charged with attracting scheduled and chartered air service to central Florida and for developing the surrounding property into commercial, industrial, and office uses.

### *Ultimate Facts and Preliminary Conclusions of Law*

1. Three applicants seek a construction permit for UHF Channel 65. Metro Broadcasting, Inc. (Metro) and Rainbow Broadcasting, Inc. (Rainbow) would operate in Orlando, Florida. Winter Park Communications (Winter Park) would operate in adjacent Winter Park, Florida.

### *Rainbow's Misrepresentation Issue*

2. We must turn first to Rainbow's basic qualifying issue. For it is axiomatic that only basically qualified applicants are entitled to 307(b) and/or comparative consideration. See e.g. *Louis Adelman*, 29 FCC 1223, 18 RR 1062 (1960) *affirmed sub. nom. Guinan* v. *Federal Communications Commission*, 297 F.2d 782, 22 RR 2026 (1961).

3. Rainbow was ordered to submit its integration showing in this case on or before April 1, 1983. It purported to do so. There it represented, *inter alia, unconditionally* that its 10% partner, Leticia Jaramillo, would serve in a management position and "will devote a minimum of forty hours per week to the operation of the station."

4. This representation turned out to be totally false. For within the month, in another proceeding, i.e., in the *Sacramento* case, Mrs. Jaramillo pledged that she would devote full-time to being General Manager of that operation. And she specifically indicated that her participation in this Orlando proposal was subservient to her Sacramento pledge.[18]

5. She was aware when she reviewed the two pledges that they were inconsistent. Her partner, Joseph Rey, was not only aware that Rainbow had misrepresented decisionally significant facts to the Commission, he was fully aware that Rainbow could be disqualified for such misrepresentations. As he testified, ". . . I think I will learn for next time."

6. So the record is clear that Rainbow has dissembled, and that such dissembling on a decisionally relevant matter is grounds for disqualification. For as the Commission said in *Tidewater Teleradio*,

---

[18] Not only did Mrs. Jaramillo misrepresent the role she would play in the Rainbow Broadcasting partnership operation, Rainbow wasn't even a legal partnership at the time she made the representation. See Footnote 5 *supra*.

*Inc.*, 24 RR 653 (1962) at paras. 6–7: "These integration or participation representations are important elements in the comparative process . . . Indeed the Commission has made it clear in numerous comparative decisions that it looks to the integration or participation representations as giving assurance of likelihood of effectuation of program proposals . . . Representations made to us in that process are not to be put forth as a part of 'gamesmanship' or for tactical advantage: They must be seriously advanced and seriously regarded in actual operation."

7. Based on the foregoing, it is concluded that Rainbow Broadcasting misrepresented decisionally significant facts in the integration proposal it submitted on April 1, 1983, and that these misrepresentations render it basically unqualified to be a Commission licensee in this proceeding. So its application will be denied without further consideration.

8. Even if it were determined *arguendo* that Rainbow's untruthfulness didn't disqualify it from comparative consideration, the conclusion would be inevitable - since the misrepresentations were on decisionally significant matters - that Rainbow should be assessed a substantial comparative character demerit; and that that substantial demerit would negate any comparative advantages that might otherwise accrue to its proposal.[19]

### *The 47 USC 307(b) Issue*

9. Having eliminated Rainbow from further consideration, we turn to whether Winter Park, Florida should be preferred over Orlando, Florida under 47 USC 307(b). Winter Park asserts that a grant of its proposal would best provide a fair, efficient, and equitable distribution of broadcast service. It says it would bring a first local television outlet to Winter Park, Florida (1980 population - 22,339) while Metro would be bringing Orlando (1980 population - 127,662) its fifth such outlet. Winter Park, it claims, needs a first local transmission outlet before Orlando needs its fifth such outlet.

10. Winter Park's claim is rejected. The Commission assigned Channel 65 to the larger and more important city of Orlando after "[h]aving determined that the Orlando *area* deserves an additional assignment." See 50 RR 2d 1714, 1717 (1982). Winter Park is an integral part of the Orlando Urbanized Area. It is less than five miles from the center of Winter Park to the center of Orlando. So neither applicant is entitled to a 47 USC 307(b) preference in this television proceeding. See *Cleveland Television Corp.*, 52 RR 2d 581 (1982); and *Buena Vista Telecasters of Texas*, 54 RR 2d 562 (1983).

---

[19] Note that comparative findings of fact have been made on Rainbow's proposal. See Findings 32, 35, and 60–68 *supra*. It's only comparative conclusions that aren't necessary. See *Edina Corp.*, 45 FCC 796 (1963) at para. 4; *WFPG, Inc.*, 33 FCC 673 (1962) at para. 13; and *Sayger Broadcasting Co.*, 32 FCC 496 at Footnote 7.

### *The Contingent Standard Comparative Issue*

11. Having eliminated Rainbow Broadcasting from comparative consideration (Conclusions 2–8) and having determined that neither Metro nor Winter Park is entitled to a decisionally significant 47 USC 307(b) preference, we must decide which of the two proposals would best serve the public interest on a comparative basis.

12. *Comparative Coverage.* As proposed Metro would serve 1,443,470 people over 7,598 square miles, while Winter Park would serve only 1,116,211 people over 5,893 square miles. More importantly, Metro would bring a fourth television service to 4,747 people (196 sq. mi.); Winter Park wouldn't bring a fourth service to anyone. Metro would also bring a fifth television reception service to 238,764 people (1,095 sq. mi.) while Winter Park would bring a fifth service to only 103,395 (510 sq. mi.). So Metro is entitled to a substantial comparative coverage preference over Winter Park.

13. *Diversification of Mass Media.* Metro Broadcasting, Inc. has no ownership or other interest in any mass communications medium. Nor, except for Jay Schenck, do any of its stockholders. Schenck owns 1,700 shares of Time, Inc. Preferred B stock. That stock carries no voting rights, and as of June 30, 1983, there were 3,282,594 outstanding shares of Time Inc. Preferred B stock.

14. Neither Winter Park, nor any of its stockholders have any ownership or other interest in any mass communications medium. So it's concluded that neither applicant is entitled to a comparative preference under this comparative criterion.

15. *Integration of Ownership.* Metro claims and is entitled to full-time quantitative integration of 99%, while Winter Park is entitled to only a part-time 10%. Moreover, the quality of Metro's 99% integration is strengthened: since 75.6% of its stock is held by integrated principals who are local residents and active in Orlando civic activities (Grindle, Coleman, Hickman, and Peoples); since 37.8% of its stock is held by principals who have some broadcast experience (Grindle and Coleman); and since 19.8% of its stock is held by a minority (Lincoln - a Black). Winter Park's 10% part-time integration isn't entitled to any qualitative enhancement. So, on integration of ownership with management Metro proves the clear and decisive winner.

### *Ultimate Conclusion*

16. Rainbow Broadcasting Company isn't basically qualified to be a Commission licensee. And Metro is an overwhelming comparative winner over Winter Park. So it is concluded that Metro Broadcasting, Inc. should be granted since it will bring the best practicable service to the public.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, Metro Broadcasting, Inc.'s application (BPCT-820707KE, Docket MM 83–140) IS GRANTED; Rainbow Broadcasting Company's application (BPCT-820909KF, Docket MM 83–142) IS DENIED; and Winter Park Communications, Inc.'s application (BPCT-820909KV, MM Docket 83–143) IS DENIED.[20]

FEDERAL COMMUNICATIONS COMMISSION
WALTER C. MILLER, *Administrative Law Judge*

---

[20] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, the Initial Decision will become effective 50 days after its public release. See 47 CFR 1.276(d).

Misrepresentation, Employment Practices

Substantial question of misclassification raised when specific evidence exists that an employee's duties and responsibilities would not place that person in the employment category indicated by the licensee, and it appears that the misclassification was intended to deceive the Commission as to the effectiveness of the station's EEO program.

*–Metroplex Communications of Florida, Inc. WHYI(FM)*
MM Docket No. 84–261

FCC 84–71

**BEFORE THE**

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of
METROPLEX COMMUNICATIONS OF FLORIDA, INC.

For Renewal of License
Station WHYI(FM)
Fort Lauderdale, Florida

MM Docket No. 84–261
File No. BRH-810924 UK

## MEMORANDUM OPINION AND ORDER

(Adopted: March 1, 1984 Released: March 9, 1984)

BY THE COMMISSION:

1. The Commission has before it: (i) the above-captioned license renewal application for Station WHYI(FM), Fort Lauderdale, Florida, filed September 24, 1981 by Metroplex Communications of Florida (WHYI or licensee); (ii) an informal objection to the application filed December 31, 1981, by Linda Silverstein;[1] (iii) an opposition thereto filed March 1, 1982, by the licensee (iv) a letter dated September 23, 1982 from the Chief, Renewal and Transfer Division, Broadcast (now Mass Media) Bureau to the licensee; (v) the licensee's response filed November 22, 1982; (vi) the petitioner's rebuttal filed December 27, 1982; (vii) a letter dated April 15, 1983 from the Chief, Enforcement Division, Mass Media Bureau to the

---

[1] Although Ms. Silverstein styled her pleading a petition to deny, she did not comply with the service requirements of Section 309(d)(1) of the Communications Act of 1934, as amended, and Section 1.47(g) of our rules. Accordingly, it is being considered an informal objection.

licensee; and (viii) the licensee's response filed June 17, 1983. For the reasons set forth herin, the Commission finds an evidentiary hearing is needed to resolve substantial and material questions concerning the truthfulness of representations made by the licensee in the EEO portion of its 1981 license renewal application concerning the promotion of women, the hiring of minorities, and the recruitment and classification of women and minorities.

2. Our action is compelled because information and explanations submitted by the licensee are internally inconsistent and appear to lack candor. In this regard, we reiterate that we are dependent on licensees to provide accurate information in responses submitted to us. *See Northern Television, Inc.*, FCC 83–504, released November 1, 1983. Thus, when it appears that a licensee has not submitted accurate information nor provided complete and candid explanations as to why inaccuracies occurred, we have little choice but to examine the licensee's qualifications in a hearing. Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. §309(e).

3. As noted, the Commission's concern with this licensee's EEO compliance was most recently triggered by an informal objection filed by a former employee, Ms. Linda Silverstein.[2] Ms. Silverstein charges that the licensee misclassified several females by improperly placing them in the "officials and managers" category of the employment report filed with the renewal application. In addition, she contends that she was a victim of intentional employment discrimination in that she was paid less than a similarly situated male employee. She also alleges that during her job interview, she was asked improper questions. The licensee opposed Ms. Silverstein's pleading, providing reasons for its classification decisions and a rebuttal of Ms. Silverstein's discrimination charges.

4. The licensee's opposition, however, did not address all of the issues raised by Ms. Silverstein. In addition, a comparison of the station's renewal application EEO program, particularly those sections setting forth job hires and promotions, with the station's license term Annual Employment Reports raised questions about the accuracy of the information submitted. In an attempt to resolve these questions, the Commission asked the licensee for additional information about the classification of its office manager, the terms and conditions of Ms. Silverstein's employment, and the implementation of its EEO program.

5. Review of the licensee's response, filed November 22, 1982, disclosed unexplained and disturbing inconsistencies among the licensee's several submissions, that is, its Annual Employment Reports, EEO program, opposition pleading, and the response. Indeed, the nature and extent of the inconsistencies suggested that

---

[2] In this regard, we note that a letter of admonishment was sent to the station at the beginning of the license term regarding its EEO practices as to Blacks.

one or more of the station's submissions were so inaccurate as to raise questions about the licensee's candor. Hence, a second inquiry was made of the licensee in an attempt to obtain accurate data as well as explanations for the inconsistencies. However, review of the licensee's second response, filed June 17, 1983, in light of the licensee's earlier submissions, leads us to conclude that substantial and material questions remain concerning the licensee's candor and its compliance with our EEO rule.

6. In order to set forth clearly our concern with the licensee, we will analyze the licensee's submissions issue by issue. Further, although our concern with the licensee arose initially from Ms. Silverstein's informal objection, we will begin our discussion of the licensee's performance with a review of its EEO program in view of the serious inconsistencies which exist there.

### I. *Promotions*

7. The most obvious inconsistencies arise from statements made about specific promotions. In Section IX (Promotion) of the station's 1981 EEO program, the licensee lists 13 protected group members whom it claimed were promoted between 1979 and 1981, together with a narrative describing the nature of the promotions. However, the licensee's November 22, 1982 and June 17, 1983 letters list fewer promotions during a period of time greater than the time period referenced in the renewal application. Even more disturbing is that only 7 of the 13 people named in the renewal application appear in the subsequent lists. For example, the renewal application states:

> "In 1978 Maryann Grahovac was hired as secretary to the General Manager, she was promoted Administrative Assistant and Office Manager in 1980. She left to pursue other careers in 1981. (Female Minority)"

That name does not appear in the November 22 or June 17 list of promotions, nor in the 1981 list of station employees, nor in the list of persons terminated during the license term. A second example is Marybeth Benivegna, who is shown as promoted to research director and supervisor in the renewal application. In one subsequent list, her job title is "Music Research," and she is classified as a clerical employee and ranked 32nd out of 34 employees in terms of pay. In another, she is shown as having been promoted from "Phone Assistant" to "Music Research Director." A third example is Joan Siani, shown in the EEO program as promoted from program assistant to public affairs director; however, she does not appear in subsequent lists of people promoted but is shown on the roster of employees as a "Program Secretary." In sum, the promotion information in the station's EEO program is not corroborated by subsequent licensee submissions nor are reasons provided for the discrepancies which exist among the three submissions. Accordingly, we find that a hearing is necessary to resolve the questions raised by the conflicting data.

II. *Job Hires*

8. The primary gauge used to determine whether a station's recruitment efforts are attracting qualified minority and female job applicants is Section VIII of the Model EEO program filed with the license renewal application. In that section, the licensee reports the number, race and sex of the hires it made during the preceeding 12 months. Analysis of this section of WHYI's renewal application shows that during the license term there were no more than 25 hires, of whom 13 or 52.0% were minorities. Since the available labor force contained 15.6% minorities, this hiring record indicated affirmative recruitment practices.

9. This hiring information became suspect when compared with the station's license term Annual Employment Reports (Form 395). For example, the station's renewal application report shows 41 employees (32 full-time and 9 part-time), but only 2 (or 4.9%) minorities. Other license term reports show: in 1981, 5 minorities or 12.1%; in 1980, 4 minorities or 9.3%; and in 1979, 4 minorities or 9.5%. The comparison of the minority hiring percentage (52.0%) with the percentage of minority employees (4.9% to 12.2%) raised substantial questions about the accuracy of the reporting or, if the figures were correct, the reasons for the high turnover of minorities. In an attempt to resolve this question, the licensee was asked to supply job hire and termination data.

10. The licensee's first response only raised further questions. Analysis of the hiring and termination data, in conjunction with the station's list of employees, indicated a minority hiring percentage of 25.6%, not 52.0% as the licensee's original submissions suggested. No explanation was provided by the licensee for this discrepancy. Consequently, the licensee was asked to describe how the various lists were prepared and to resubmit lists of employees, hires and terminations.

11. Review of the second response indicates that during the relevant period, 11 of 42 hires, or 26.2%, were minorities. The licensee explains that the discrepancies between its license renewal submission and later ones arose because several different persons, using various sources, prepared the submissions. In addition, the licensee asserts that its general manager was unfamiliar with the station's EEO records.

12. We view the licensee's explanation for the discrepancies to be inadequate. We are particularly troubled by the magnitude of the error present in the station's report of job hires (at least 17 more hires and 2 less minority hires than originally reported) and by the licensee's continued failure to report any of the part-time hires it made during the license term. Accordingly, in order to develop a

complete record as to why the station's initial report of job hires was so far off the mark and to determine what the station's hiring figures for the license term actually were, it is necessary to explore these matters at the hearing.

III. *Recruitment*

13. In Section IV of the Model EEO program, the licensee is asked to list the recruitment sources utilized during the 12 months preceding the filing of the station's renewal application and note the number of referrals received from each source. Analysis of this information in conjunction with job hire data, enables the licensee and the Commission to determine whether the licensee's listed recruitment sources have been "productive", *i.e.*, whether the station's employment needs are being communicated to sources of qualified female and minority job applicants.

14. The station's initial list of recruitment sources contains four minority/female organizations (showing no referrals), plus the Florida State Employment Agency (1 referral), 3 schools (5 referrals), and 5 newspapers, including a Black newspaper and a Spanish-language newspaper ("Total over 15" referrals). Hence, the station's EEO program represents that various recruitment sources/techniques were used and that referrals resulted. In responding to the Commission's first inquiry about its recruitment efforts, the licensee states:

> "In response to Paragraph 2 concerning referral sources, we realized we had not been keeping adequate files concerning applicants and referrals. This is one of the reasons why Ms. Walker was promoted to Office Manager. [According to other material in the same letter, this occurred on December 12, 1980, seven months prior to filing the renewal application.] Since that time, we have extremely accurate files of applicants, and Ms. Walker is aggressively seeking minorities from newspapers, letter writing campaign and cultivating relationships with various employment services.
>
> For every job opening a letter is written to NAACP, Florida Employment Services, Equal Employment Opportunity Commission, and an ad is placed in the following newspapers: The Fourt [sic] Lauderdale News, the Miami Times, the Miami Courier.
>
> In addition to the foregoing recruitment sources, we have resorted to paying fees to employment agencies."

15. Because the sources cited were not the same as those initially listed and because the licensee's first reference to a person hired as a result of a referral contact occurred *subsequent* to the filing of the station's renewal application, a question was raised as to whether the sources cited by the licensee in its EEO program had actually been used. The licensee was advised of the above and directed to state the dates on which the recruitment contacts referenced in its renewal application had occurred.

16. Although the licensee has responded, our concern about the

variances between the two lists has not been satisfied, and the information provided raises questions not only about the renewal application's claimed recruitment efforts but also about the licensee's claims concerning Ms. Cynthia Walker. *See infra*, Sections IV and V. According to the station's former general manager, Matt Mills, recruitment contacts, primarily by telephone, were made by him with the organizations listed in the station's renewal application during the "month preceding the filing of the renewal application." June 17, 1983 letter Exhibit G. He also contends that in preparing the EEO program he referred to other unspecified documentation. The licensee's other exhibits which reflect recruitment contacts and referrals show that most if not all of the station's pre-renewal recruitment activities occurred between February 1979 and May 1980—the latter date being 1 month before Mr. Mills became the station's general manager and some 15 months before the station's renewal application was filed. Similarly, the recruitment efforts cited in the licensee's November 22 letter are shown to have occurred *not* during the period immediately following Ms. Walker's promotion to the position of office manager on December 12, 1980, but after August 26, 1981, when she supposedly became responsible for EEO program implementation. However, even assuming the latter date to be correct, the first documented recruitment effort under Ms. Walker did not occur until February 24, 1982. Hence, none of the recruitment efforts reflected in the licensee's November 22 and June 17 letters occurred during the 12-month period referenced in the station's renewal application. Further, contrary to the station's initial claim that increased recruitment activity occurred immediately after Ms. Walker's promotion to office manager, it appears that increased recruitment did not begin until after the filing of Ms. Silverstein's challenge. Given the foregoing, we believe it necessary to explore thoroughly the station's license term recruitment efforts to determine whether any of the licensee's several descriptions of its efforts resulted from misrepresentations or a lack of candor.

### IV. *Responsibility for EEO Program Implementation*

17. Section II of the WHYI(FM) renewal application EEO program names Cynthia Walker as the person responsible for the program's administration and implementation. In the licensee's opposition to Ms. Silverstein's renewal challenge, no mention is made of Ms. Walker's EEO responsibilities. Nevertheless, the licensee, in its next submission (November 22 letter) declares that Ms. Walker's new duties subsequent to her promotion included responsibility for the implementation of the station's EEO program. Although the licensee's final submission repeats that Ms. Walker was responsible for EEO program implementation, the supporting documentation appears inconsistent with related and previously

filed claims. For example, while the licensee's November 22 letter indicates that Ms. Walker became responsible for the EEO program after her promotion on December 12, 1980, its June 17 letter shows that her EEO responsibilities commenced no earlier than August 26, 1981. Further, the affidavit from the station's former general manager, Matt Mills, states that he was the person who made recruitment contacts "over the month preceding the filing of the renewal application" (*i.e.*, September 1981), a fact seemingly affirmed in an affidavit from Ms. Walker that reflects no EEO recruitment contacts by her prior to February 1982. Accordingly, it appears that the licensee's claims regarding Ms. Walker's responsibilities are inaccurate, and we therefore believe that the truthfulness of the station's representations needs to be explored.

### V. *Classification of Employees and EEO Profile*

18. Since 1977, the Commission, at the time of license renewal, has applied processing guidelines to a station's employment profile for all full-time jobs and for full-time positions in the upper-four job categories in order to determine which EEO programs warrant in-depth review by the staff. *EEO Processing Guidelines*, 79 F.C.C. 2d 922 (1980). Hence, a licensee's classification of its employees, pursuant to Section VII of the EEO program, is significant since such in-depth review of the station's employment practices will not generally occur where the employment profile is within the Commission's processing guidelines. The staff relies on the licensee's classification of its employees and will only question or disagree with the licensee's decision where the record plainly indicates that erroneous information has been submitted. *Renewals of Louisiana and Mississippi Broadcast Stations*, FCC 83–228, 53 R.R. 2d 1294, 1298 n.11 (1983); *Malrite of Ohio, Inc.*, 64 F.C.C. 2d 601, 603 (1977). Even when it appear that a licensee's classification of an employee is erroneous, the Commission will not explore that classification decision in a hearing unless an intent to deceive the Commission is discernible. *Malrite of Ohio Inc., supra. See also, CBS, Inc.*, 88 F.C.C. 2d 649, 666 (1981); *Nondiscrimination in Employment Practices*, 60 F.C.C. 2d 226, 238 (1976). With these principles in mind, we turn to Ms. Silverstein's charges of misclassification and the licensee's responses.

19. In her informal objection, Ms. Silverstein contends that "[m]anagement hypes job titles when it comes to the classification of female employees." The example she focuses on is the classification of Cynthia Walker, the station's office manager, as an official and manager. Ms. Silverstein charges that Ms. Walker's duties included typing, filing, switchboard relief, and the ordering of office supplies, and that Ms. Walker was simply the secretary of Matt Mills, the general manager, and David Ross, a vice president. With respect to herself, Ms. Silverstein claims that the licensee retained her past the

renewal filing date solely to enhance the station's employment profile. (She was one of three females classified by the station as an official and manager.) In responding to these allegations as well as to Commission inquiries about these matters, the licensee has once more submitted conflicting statements. These inconsistencies not only raise doubts about the licensee's candor with respect to the classification of Ms. Walker and Ms. Silverstein, but also call into question its classification of other females.

20. With respect to Ms. Silverstein's charge concerning Cynthia Walker, the licensee's initial response states: "Her [Ms. Walker's] duties extend far beyond her role as Secretary to myself and David Ross . . . . in the absence of myself and David Ross from the station, Ms. Walker is responsible for the oversight of the *entire* operation of the radio station." (Emphasis added.) In response to a Commission request for a clarification, the licensee modified its claim by asserting that Ms. Walker supervised a number of persons, including the business manager and engineer. The same response reveals that Ms. Walker was ranked 20th of 34 station employees in terms of salary while the business manager and engineer were ranked 7th and 4th, respectively. An additional inconsistency relative to the classification of Ms. Walker is the licensee's contention that her promotion to office manager occurred on December 12, 1980 even though the licensee's 1981 Annual Employment Report, based on a March 1981 pay period, reflects Ms. Walker as a clerical employee.

21. The classification of Ms. Silverstein as an official and manager also raises doubt about the candor of the licensee. For instance, the licensee states in its opposition that: ". . . Ms. Silverstein was in charge of over 48 sales persons in various McGavren-Guild (our National Sales Representative) offices throughout the United States." When asked for a full description of her supervisory responsibilities over employees of a separately owned company, the licensee modified the "in charge of" description to "coordination" with McGavren-Guild employees. Thus, although WHYI substantiates Ms. Silverstein's duties as a bona fide sales worker, it is unable to demonstrate that she had supervisory responsibility over any station employee, thus calling into question the accuracy of her classification as an official and manager.

22. Finally, it appears that the licensee misclassified two workers reported as technicians. The renewal application EEO program shows 27 full-time employees classified in the upper-four job categories, including two female technicians. However, a list submitted with the licensee's November 22 letter shows 26 upper-four employees but no female technicians. When asked to explain the discrepancy, the licensee never directly addresses the inconsistency but contends that the use of sophisticated office machines warrants the classification of the station's traffic manager and her assistant as

technicians, a classification that does not comply with Form 395 instructions.

23. In our view, the incidents of questionable employee classifications appear to support the contentions of Ms. Silverstein. In this regard, we are concerned that not only has the licensee portrayed women as occupying higher level jobs than they perform, but also it has made conflicting statements for each action. Since the Commission has historically cautioned licensees about inflated classifications (*see Nondiscrimination in Employment Practices, supra* at 238) and provided additional guidance to licensees with regard to classification parameters, (*FCC Form 395-EEO* , 70 F.C.C. 2d 1466, 1478-79 (1979)), we believe it necessary based on this record, to determine the accuracy of the licensee's classifications by way of a hearing.

24. It also appears that WHYI relied on the inflated classifications of its female employees to show that their representation on the station's staff exceeded the Commission's processing criteria. WHYI begins the self-analysis portion of the EEO program Section X as follows: "Ten of the stations thirty-two full-time employees (31%) are women, and six of the station's twenty-seven full-time upper-level employees (22%) are women."[3] However, predicated on our best estimate of the correct showing, there were 34 full-time employees, including 10 (or 29.4%) women and 2 (or 5.9%) minorities, and 25 upper-four employees, including only 3 (or 12.0%) women and 1 (or 4.0%) minority, an Asian American.[4] When the revised figures are compared to the Fort Lauderdale-Hollywood SMSA labor force — 39.1% women and 15.6% minorities (12.9% Black, 2.4% Hispanic and .3% others) — WHYI fails the Commission's processing guidelines for women in upper-level jobs and for minorities both overall and in the upper-four jobs. Thus, we are concerned that WHYI may have intentionally overstated its female representation[5] and not mentioned the level of minority representation at the station[6] to avoid in-depth scrutiny of its EEO program and we believe the hearing should also explore this matter.

## VI. *Candor Concerning Compensation and Termination*

25. Ms. Silverstein also charges in her informal objection that,

---

[3] The analysis is devoid of any reference to the number or percentage of minority employees. Rather the program states: "The record of the station has been good with respect to hiring minorities . . ."

[4] For this analysis, the station's office manager as well as the females classified as technicians are being considered as clerical employees. In addition, one clerical employee who was originally listed as white is now stated to be Hispanic and is being considered as such.

[5] Such a scenario is consistent with Ms. Silverstein's claim that she was retained by the licensee past the renewal filing date in order to enhance the station's profile.

[6] *See* note 2, *supra* .

because of gender, she was paid less than a male alleged to be similarly situated. She also claims she was asked "illegal" questions during her job interview for the position of WHYI(FM) national sales manager. In its opposition and in subsequent responses, the licensee denies these allegations. However, review of the licensee's statements regarding Ms. Silverstein's termination again raises questions about the licensee's candor. Accordingly, although we are referring Ms. Silverstein's claims of discrimination to the Equal Employment Opportunity Commission for investigation and resolution,[7] we will explore the inconsistencies present in the various statements of the licensee concerning Ms. Silverstein's termination only insofar as they relate to the licensee's candor and the question of misrepresentation.

26. In responding to claims about Ms. Silverstein's compensation, the licensee initially declares that through November 1981, Ms. Silverstein earned $22,638 and that, on an annualized basis, she would have earned $24,138 for all of 1981. In addition, the licensee states that in the job interview for national sales manager, she was informed she could expect to earn between $24,000 and $25,000 in 1981. Nonetheless, in its November 22 letter, the licensee states that one of the reasons for Ms. Silverstein's termination was her failure to achieve her sales goal of $1,500,000.[8] The licensee also contends that Ms. Silverstein's performance, relative to her goal, was substantially less than that of her predecessor. According to the licensee, Ms. Silverstein's predecessor exceeded her goal of $900,000 by more than $200,000. In rebuttal, Ms. Silverstein claims that at the time of her termination, national sales were at 92% of projections in spite of declining station ratings, and that her predecessor's alleged performance was based on a combination of billing from WHYI and WHTT, Metroplex' co-owned AM station in the area.

27. In view of the above, the licensee was directed to submit additional information about the reasons for Ms. Silverstein's termination. In response, the licensee alters its sales goal for Ms. Silverstein from $1,500,000 to $1,600,000, states that 1981 national sales were only $1,408,000 (or 88% of the revised projection), and alters its previous claim about the performance of Ms. Silverstein's predecessor. Further, the licensee explains that had Ms. Silverstein achieved her sales goal, she would have earned $24,936 in 1981.

28. We are both confused and troubled by the licensee's claims

---

[7] *FCC & EEOC Memorandum of Understanding*, 70 F.C.C. 2d 2320 (1978).

[8] The licensee also claims that Ms. Silverstein's termination was premised on her failure to relate well with McGavren-Guild employees and on the licensee's desire to reorganize its sales department. However, with regard to the first reason we note that Ms. Silverstein has supplied documentation indicating that McGavren-Guild employees appreciated her work. As to the second reason, the sales staff appears, subsequent to Ms. Silverstein's termination, to differ little from the organization existing before her termination.

regarding Ms. Silverstein. Specifically, we have from the licensee two figures for what Ms. Silverstein should have achieved, two sets of figures for her predecessor's sales goal and actual sales, and an apparently incorrect figure for Ms. Silverstein's earnings on an annualized basis.[9] In view of the foregoing as well as our concerns about the licensee's overall veracity, we believe it appropriate to have these matters resolved in the hearing.

## VII. *Discrimination*

29. We also believe that a substantial and material question exists with regard to the station's compliance with our EEO rule (Section 73.2080 of the Commission's Rules). As noted, the corrected final license term employment report for the station reflects 34 full-time employees, including 10 (29.4%) women and 2 (5.9%) minorities, and 25 persons in the upper-four job categories, including 3 (12.0%) women and 1 (4.0%) minority, an Asian American. The station's 1981 Annual Employment Report, as corrected, reflects 33 full-time employees, including 9 (27.3%) women and 2 (6.1%) minorities, and 25 employees in upper-level jobs, including 2 (8.0%) women and no minorities. In 1980, the report, as corrected, lists 32 full-time employees, including 12 (37.5%) women and 4 (12.5%) minorities, and 23 persons in upper-level jobs, including 4 (17.4%) women and 2 (8.7%) minorities, both Hispanics. Finally, the 1979 report shows 34 persons, including 13 (38.2%) women and 3 (8.8%) minorities, and 26 persons in upper-level jobs, including 7 (26.9%) women and 1 (3.8%) minority, a Black. These figures show that while the station has employed women and minorities in various positions of responsibility during the 1979-1982 license term, there was a steady decline in female employment in upper-level jobs and, except for 1979, there were no Blacks in upper-level positions. Consistent with this data are the station's job hire figures which indicate that for 23 upper-level jobs, only 4 (17.4%) went to women and none went to a Black. When this information is coupled with the licensee's evasive responses to Commission inquiries concerning the station's recruitment efforts, we find that a question exists as to whether the EEO program was either passive or nonexistent. Since our attempts to resolve the questions raised by the conflicting licensee submissions outside of the hearing process have failed, we have no choice but to explore at the hearing whether the station did in fact fail to implement its affirmative action program during the license term, and, if it did so fail, whether that failure was the result of inadvertence or intentional discrimination. *Bilingual Bicultural Coalition on Mass Media* v. *FCC*, 595 F.2d 621 (D.C. Cir. 1978).

---

[9] Assuming that Ms. Silverstein earned $22,638 for 11 months, her projected compensation for 12 months is $24,696, not $24,138 as claimed by the licensee.

## VIII. *Conclusion*

30. Accordingly, IT IS ORDERED, that the petition to deny filed by Linda Silverstein IS DISMISSED and when considered as an informal objection IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

31. IT IS FURTHER ORDERED, that pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned license renewal application IS DESIGNATED FOR HEARING at a time and place to be specified in a subsequent Order upon the following issues:

1. To determine whether the licensee made misrepresentations or was lacking in candor in the 1981 renewal application EEO program and in its explanations submitted in response to Commission inquiries about that program.

2. To determine whether the licensee made misrepresentations or was lacking in candor with regard to its classification of female employees and its explanations submitted in response to Commission inquiries about the classifications.

3. To determine whether the licensee made misrepresentations or was lacking in candor with regard to statements concerning Ms. Silverstein's termination.

4. To determine whether Station WHYI(FM) violated Section 73.2080 of the Commission's Rules with regard to the employment of females and Blacks.

5. To determine whether, in light of the evidence adduced pursuant to the foregoing issues, a grant of the subject license renewal application would serve the public interest, convenience, and necessity.

32. IT IS FURTHER ORDERED, that in accordance with Section 309(e) of the Communications Act of 1934, as amended, the burden of proceeding with the introduction of evidence upon issues (1)-(4) and the burden of proof with respect to all issues shall be upon the applicant, Metroplex Communications of Florida, Inc.

33. IT IS FURTHER ORDERED, that to avail itself of the opportunity to be heard, the applicant shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within twenty (20) days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in the Order.

34. IT IS FURTHER ORDERED, that Metroplex shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in that rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

35. IT IS FURTHER ORDERED, that the licensee may transfer

freely its other broadcast station licenses, unless and until it is otherwise directed.[10]

36. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail — Return Receipt Requested one copy of this Order to the applicant and to Ms. Silverstein.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

---

[10] *See Transferability of Broadcast Licenses*, FCC 83-65, 53 R.R. 2d 126 (1983).

Common, Carrier, Access Charges Distributions

*Order Granting Waiver* adopted which permits settlements to local exchange carriers that use cost studies for "line haul" and private line functions while using average schedules for other functions.

*–MTS/WATS Market Structure*
CC Docket 78–72, Phase I

FCC 84-77

BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| In the Matter of | |
|---|---|
| MTS and WATS Market Structure | CC Docket No. 78–72 Phase I |

## ORDER GRANTING WAIVER

(Adopted: March 5, 1984; Released: March 9, 1984)

BY THE COMMISSION: Commissioner Patrick not participating.

1. By Memorandum Opinion and Order, FCC 83–509, released November 14, 1983, (*Formula Approval Order* ), the Commission accepted an average schedule formula proposed by AT&T to determine access revenue distributions payable by the National Exchange Carrier Association ("NECA") to those companies that are compensated under the average schedule. The Commission found, however, that one provision of the formula was inconsistent with the *Access Charge Reconsideration Order* [1] insofar as it would have allowed companies to settle on a cost basis for certain access elements while receiving distributions based on the average schedule for others. In a letter to the Chief, Common Carrier Bureau dated December 6, 1983, NECA requested that the Commission waive its prohibition against the simultaneous use of individual cost data for "C" and "Special Services" functions with average schedule cost data for "A" and "B" functions.[2]

---

[1] *MTS and WATS Market Structure Phase I* , FCC 83-386, 48 Fed. Reg. 42987. (released August 22, 1983), at para. 197.

[2] Currently there are three groups of average schedules: Schedules A, B, and C. These groups reflect the revenue requirements associated with the various functions performed by local exchange telephone companies in the provision of message services (MTS), 800 service, and outward wide area telecommunication service (WATS). The "A" function schedule reflects the allocated toll revenue

2. In supporting its request, NECA stated that the "C" function and the "Special Services" function average cost schedules have not been updated since 1957. This has resulted in a situation in which local exchange carriers have been compensated upon bases other than average schedule cost data for "C" and "Special Services" functions while receiving settlements on the basis of average schedule data for "A" and "B" functions. For average schedule exchange carriers, compliance with the Commission's *Formula Approval Order*[3] would require either that Schedule A & B companies revert to 1957 level average cost schedules for C and Special Service functions, with concommitant reductions in revenues, or that individual cost studies be prepared in lieu of Schedules A and B. NECA stated that a two year waiver would provide sufficient time to gather and analyze data and to revise the C and Special Service average settlement schedules.

3. Underlying the Commission's access charge plan was a recognition that the presence of average schedules for exchange carriers has facilitated the settlements process, and has enabled many small telephone companies to economize on record keeping by reducing the amount of data which would otherwise be required. The Commission's decision to permit a continuation of average schedule settlements was based upon the premise that unnecessary disruptions in the distribution of access charges revenues were not desirable, and that additional administrative burdens during the transition period should be mitigated as long as the underlying integrity of the access charge decision was not vitiated.

4. It was not apparent, however, upon reconsideration or at the time of the adoption of the *Formula Approval Order* , that local exchange carriers would encounter substantial difficulty in developing cost studies by the time access charge tariffs were likely to go into effect. Nor was it evident that requiring local exchange carriers to elect either average schedule treatment *or* cost study treatment would disrupt revenue streams to Independent telephone companies during the transition to Exchange Carrier Association administered distributions of access charges revenues.

5. Although the Commission's policy is clearly directed to requiring that local exchange carriers be compensated for local

---

requirements incurred in providing local exchange facilities for originating and terminating MTS and WATS messages, and buildings, central office equipment, billing, and collecting. The "B" function schedules include the revenue requirements which are associated with toll operating, automatic ticketing, automatic number identification, and intertoll dial switching equipment. The "C" function schedule has been used to calculate settlements for the provision of toll interexchange (or "Line Haul") functions. "Special Services" functions have covered private line services (e.g., point to point private line, remote metering, and data services). Source: Memorandum from W.R. Stump (Assistant Vice President, A.T.&T.) to the Chief, Common Carrier Bureau, dated June 30, 1983.

[3] *See also* section 69.606(b) of the rules, 48 Fed. Reg. 10366 (November 14, 1983).

access functions either on the basis of individual cost studies or average cost schedules, it was not the intention of the Commission to introduce major dislocations during the initial transition from settlements arrangements to Exchange Carrier Association distributions of access charges revenues. As a consequence, to facilitate that transition, a waiver of the terms of the *Formula Approval Order* and the underlying provisions of the *Access Charge Reconsideration Order* is granted to permit:

> (1) the use of individual company cost or other relevant studies for Schedule "C" functions by companies that are also being compensated under average schedules for "A" and "B" functions;
>
> (2) the use of individual company cost or other relevant studies for Special Service settlements by companies that are also being compensated under average schedules for other access services.

6. Accordingly, IT IS ORDERED, that the request of the National Exchange Carriers Association for waiver effective as of the adoption date of this order and is granted through June 1, 1986.
7. This order shall be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Broadcast Experience
Civic Participation, Effect of
Comparative Coverage Issue
Local Residence
Minority Ownership, Factor in Comparative Proceeding

Review Board reversed Initial Decision and awarded CP to applicant with slight comparative coverage and ownership integration preferences. Latter preference based on superior qualitative enhancement credits—substantial preference for 100% local residence, moderate preference for civic participation, and slight preference for b/c experience versus substantial preference for 100% integrated minority ownership.
–*Radio Jonesboro, Inc.*
BC Docket 82–641

FCC 84R–20

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| RADIO JONESBORO, INC.<br>Jonesboro, Arkansas | BC Docket No. 82–641<br>File No. BPH-810603AG |
| MSB COMMUNICATIONS CORPORATION<br>Jonesboro, Arkansas | BC Docket No. 82–643<br>File No. BPH-811027AC |
| WHISPERING SOUNDS, INCORPORATED<br>Jonesboro, Arkansas | BC Docket No. 82–645<br>File No. BPH-811028AL |
| For Construction Permit for a New FM Station | |

*Appearances*

*Eugene T. Smith*, on behalf of Radio Jonesboro, Inc.; *Rudolph L. Ennis*, on behalf of MSB Communications Corporation; and *Forbes W. Blair* and *William D. Silva*, on behalf of Wispering Sounds, Incorporated.

## DECISION

(Adopted: March 14, 1984; Released: March 21, 1984.)

**By the Review Board:** MARINO (Chairman) and JACOBS. Board Member BLUMENTHAL not participating.

**Board Member JACOBS:**

1. This nominally three-party comparative broadcast proceeding[1] has been refined in the hearing crucible to the essential question whether the various "best practicable service" credits attributable to MSB Communications Corporation (MSB) and its 100% full-time owners, J. Murl Smith and O.L. Bayless, exceed the "substantial enhancement credit" that Whispering Sounds, Incorporated (WSI) merits for its proposed full-time general manager and black 100% stockholder, Ben McGee. We believe that they do and accordingly award the construction permit for a new FM station at Jonesboro, Arkansas, to MSB.

2. Having narrowed the decisional distinctions between MSB and WSI to the qualitative enhancement aspects of their ownership integration proposals, the I.D. herein gave MSB a preference for the local residence of its two principals, a slight preference for their civic activities, and a very slight preference for Bayless' past broadcast experience. I.D., *supra* note 1, at Conclusions, para. 6. However, the ALJ concluded, citing *Waters Broadcasting Corporation*, 91 FCC 2d 1260, 52 RR 2d 1063 (1982), *appeal docketed sub nom. West Michigan Broadcasting Co.* v. *FCC*, No. 82–2513, D.C., December 22, 1982, that WSI's 100% minority ownership overcame all of MSB's preferences and tipped the comparative scales in favor of granting WSI's application. I.D., Conclusions, paras. 6, 7. The proceeding is now before the Review Board on exceptions filed by MSB and RJI and replies filed by WSI. The Board has reviewed the I.D. in light of the exceptions and briefs, the oral argument held February 10, 1984, and our examination of the record. In reversing the ALJ's ultimate conclusion and holding that grant of MSB's application would better serve the public interest, convenience and necessity, we nevertheless adopt the ALJ's findings of fact and conclusions of law, except as modified herein.

---

[1] There were originally seven mutually exclusive applications. See Hearing Designation Order, 47 Fed. Reg. 42808, published September 29, 1982, and Hearing Designation Order, 48 Fed. Reg. 4731, published February 2, 1983. Subsequently, all of the applications were dismissed except for the three captioned above. Presiding Administrative Law Judge John H. Conlin correctly concluded in his Initial Decision (I.D.), FCC 83D-59, released November 3, 1983, at Conclusions, paras. 2–4, that the comparative credentials of Radio Jonesboro, Inc. (RJI) are substantially inferior to the other two applicants because RJI already owns an AM station in Jonesboro (Station KNEA) and does not propose any cognizable integration of its owners into management of the proposed FM station.

3. *Ownership Integration.* Although the ALJ quickly swept aside arguments by MSB and WSI that their opponent principals were distracted by other business endeavors and would not be able to effectuate their full-time integration proposals, I.D., Conclusions, para. 5, MSB and WSI renew their charges on appeal. We summarily deny these exceptions as speculation without substance in light of both applicants' unrebutted undertakings (with specifics) to curtail their other business activities to less than 20 hours per week. We cannot say as a matter of law that 60-hour work weeks are incapable of effectuation. *Compare Bradley, Hand and Triplett*, 89 FCC 2d 657, 51 RR 2d 383 (Rev. Bd. 1982) (50–60 hour work week proposal fully credited), *with Berryville Broadcasting Co.*, 70 FCC 2d 1, 44 RR 2d 1325 (Rev. Bd. 1978) (70-hour work week proposal not likely to be effectuated). Similarly, we reject MSB's attack on the feasibility of McGee's continued permanent residence in Marion, Arkansas, which is 50–60 miles from Jonesboro, and his plan either to commute daily to Jonesboro or to make some use of an apartment there. Again, we cannot hold that a two-hour daily commute is inherently unreasonable, *but see Berryville Broadcasting Co., supra* (three-hour daily commute questioned), and WSI did not receive any credit for proposed future residence in Jonesboro and has not excepted to the lack of such credit. Tr. 190.[2]

4. Thus, we affirm the ALJ's conclusions that MSB and WSI are both capable of effectuating their integration proposals and are entitled to 100% quantitative ownership integration credit. Under these circumstances, the ultimate choice of a winner must focus on qualitative enhancements and any other distinctions that may be deemed decisionally significant. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 399, 5 RR 2d 1901, 1913 (1965); *North Carolina Radio Service, Inc.*, 92 FCC 2d 621, 52 RR 2d 993 (Rev. Bd. 1982), *rev. denied*, FCC 83–211, released May 3, 1983. And we recognize that, in such close cases, qualitative differences that might ordinarily appear slight loom larger. *See Birmingham Family TV, Inc.*, 91 FCC 2d 348, 354, 52 RR 2d 525, 529 (Rev. Bd. 1982).

5. As to enhancement credit for civic participation, MSB argues that it is entitled to more than a "slight" preference over WSI, and, indeed, that WSI does not deserve any civic participation credit at all because McGee has never resided in Jonesboro and residence is a prerequisite for such credit. MSB Br. 12. For its part, WSI asserts that MSB's civic activities are too dated to receive credit. We begin by summarizing the relevant civic activities of all three key

---

[2] Nor has WSI excepted to the ALJ's awarding of a local residence enhancement preference to MSB. We interpret this preference as being "substantial" in light of MSB's 100% local residence for upwards of 18 years (see paragraph 5, *infra*) and WSI's complete absence of past local residence or proposed future residence. *See Waters, supra.*

principals. MSB's Smith has been a director of the Craighead County Cancer Association since 1982, a member of the Jonesboro Rotary Club from 1974 to 1976, secretary of the Jonesboro Lions Club from 1967 to 1968, chairman of the Jonesboro March of Dimes in 1968, and an active member of Central Baptist Church in Jonesboro since 1957. MSB Exh. 3, p. 2. MSB's Bayless has been secretary of the Jonesboro Rotary Club since July 1982, a member of the local Rotary Foundation Scholarship Committee since Uuly 1981, a member of the Jonesboro Fine Arts Council since 1980, a member of the Kiwanis Club from 1973 to 1974, and an active member of Central Baptist Church in Jonesboro since 1974. MSB Exh. 4, p. 2. Smith has resided in or near Jonesboro since 1957, and Bayless moved to Jonesboro in July 1965. On the other hand, WSI's McGee was a member of the Board of Trustees of Arkansas State University at Jonesboro from 1976 to 1980 and has been a member of the University's Foundation Board (fundraising) since 1982. WSI Exh. 2, Att. A. While McGee has also been involved in a large amount of civic activity in Marion, West Memphis, and Little Rock, Arkansas (*id.*), none of these activities occurred in Jonesboro or within the proposed service area of WSI's application; hence, they warrant no enhancement credit. *Policy Statement, supra*; *cf. Waters Broadcasting Corporation, supra* (civic participation credit given for activities within service area). As previously noted, McGee resides 50–60 miles from Jonesboro, and the record does not reflect that he has ever resided in Jonesboro or within the proposed service area.

6. Credit for past (or present) civic participation is predicated on the view that such participation has instilled useful knowledge of the community's needs and interests in the involved station principal and that this involvement betokens an interest in the welfare of the community. *Policy Statement, supra*, 1 FCC 2d at 396, 5 RR 2d at 1910. Contrary to MSB's bald assertion, nowhere does the Commission affirmatively make local residence a prerequisite for civic credit, for its focus in this matter is on knowledge gained and interest shown, not on physical abode.[3] Local residence is a separate enhancement feature. Thus, we affirm the ALJ's conclusion that WSI merits "some credit" for McGee's non-resident civic involvement with ASU. However, it is obvious that this participation is significantly less in terms of length and breadth than that of Smith and Bayless. See paragraph 5, *supra*. While it is true that the Commission will discount or even disregard past civic participation

---

[3] We have considered the *Policy Statement's* reference to civic affairs involvement as being "a part of a participating owner's local residence background," 1 FCC 2d at 396, 5 RR 2d at 1910, but it is clear from the remainder of that very sentence that the Commission's concern is with the benefits of local involvement *per se*, rather than with a nexus between local involvement and local residence. Obviously one does not have to be a local resident to make a useful contribution to, or derive knowledge from, local civic participation.

that is antediluvian, *compare Veterans Broadcasting Co., Inc.*, 38 FCC 25, 61, 4 RR 2d 375, 417 (1965) ("7 years of withdrawal from the civic scene" criticized), *with Ottumwa Broadcasting Company*, 92 FCC 2d 1011, 52 RR 2d 1447 (Rev. Bd. 1982) (25-year-old civic participation given no credit), all of Bayless' credited involvement and most of Smith's has occurred since 1974 (within seven years before MSB's application was filed). Nevertheless, their pre-1974 activities warrant somewhat reduced credit. Even with this adjustment, MSB's civic participation advantage is still significant.

7. At the other extreme, WSI also challenges awarding MSB any credit for activities that postdate the filing of MSB's application on October 27, 1981 as a type of *post litem motam* upgrading of qualifications. However, we recently held in *Bradley, Hand and Triplett, supra*, that some credit should be afforded post-filing and current civic involvement, albeit not as much as a past record of participation would warrant. 89 FCC 2d at 663, 51 RR 2d at 388. This credit diminution affects both WSI and MSB, since both applications were filed in October 1981. Factoring it into our analysis, we again conclude that MSB enjoys a significant civic participation advantage over WSI. Moreover, we believe that MSB's demonstrated superiority under this enhancement element is sufficient to warrant a moderate civic participation preference, instead of the slight preference that the ALJ awarded. In reaching this conclusion, we essentially depart from the ALJ's characterization of Smith's and Bayless' activities as "not extensive" (I.D., Conclusions, para. 6). See paragraphs 5–6, *supra*.

8. Turning to previous broadcast experience, MSB asserts that the ALJ awarded inadequate credit for Bayless' activity.[4] In particular, it urges that Bayless had a 10% ownership interest in Station KBHS(AM), Hot Springs, Arkansas, from December 1952 to March 1962 and worked more than 40 hours per week at that station from June 1953 to June 1954 as a staff announcer and Sports Director (MSB Exh. 4, p. 1), but the ALJ's findings (I.D., n. 3) reference only "Bayless' one-year employment as a radio announcer." Noting that this enhancement factor is of only "minor significance," *Policy Statement, supra*, 1 FCC 2d at 396, 5 RR 2d at 1910, and that Bayless' experience was acquired more than 20 years ago, we nevertheless agree that it is more extensive than the ALJ found—involving ownership and management functions as well as purely employee duties—and is entitled to greater recognition. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 847, 849–50, 50 RR 2d 1117, 1131–32 (Rev. Bd. 1981) (13-year-old broadcast experience credited; no limit recognized); *Poet's Seat Broadcasting, Inc.*, 78 FCC 2d 1080, 1085 n. 9, 47 RR 2d 1265, 1270 n. 9 (Rev. Bd. 1980) (previous

---

[4] WSI received no credit under this rubric because McGee has absolutely no previous broadcast experience.

experience of only 31 or 37 months credited); *Lynn Mountain Broadcasting*, 9 FCC 2d 854, 856 n. 4, 11 RR 2d 88, 91 n. 4 (Rev. Bd. 1967) (minute experience credit given for broadcast ownership without day-to-day operational participation). Hence, we conclude that MSB deserves a slight enhancement preference for Bayless' previous broadcast experience.

9. We have already noted in paragraph 2, *supra*, that the ALJ awarded a decisive enhancement preference to WSI, based on the *Waters* case and WSI's 100% minority ownership (MSB has no minority ownership). MSB's exceptions address only a narrow aspect of this matter, asserting that because WSI is entitled to either no quantitative integration credit or only partial credit, its minority enhancement preference must be correspondingly eliminated or diminished and is, therefore, no longer decisive. MSB Br. 10–11. This contention has been mooted by our affirmance of the ALJ's award of full quantitative integration credit to WSI. See paragraphs 3–4, *supra*. However, at oral argument MSB amplified its exception to maintain (Tr. 158–63) that, contrary to the ALJ's interpretation of *Waters*, that case does not stand for the proposition that a substantial minority enhancement preference will automatically overcome an opponent's other enhancement preferences, whatever their number and magnitude. To the contrary, according to MSB, *Waters* specifically held that substantial enhancement credits for minority ownership and for local residence and civic involvement are of equal weight; what became determinative in *Waters* was that the minority applicant's non-minority credits outweighed its opponent's non-residence/involvement credit.[5] In rebuttal, WSI contends that, even in the face of equal enhancement credits for minority ownership and local residence and involvement, *Waters* dictates that primacy be given to the minority applicant; in any event, according to WSI, in the instant case WSI's civic involvement warrants more credit than MSB's, so that there is no "tie" between minority and local involvement preferences. Tr. 179–80.

10. The Board believes that MSB's reading of *Waters* is correct and is supported by the plain language of that decision: "[W]e need not qualitatively differentiate between the substantial enhancement credits awarded for local ownership and for minority ownership or choose between these important policies . . . ." 91 FCC 2d at 1266, 52 RR 2d at 1068. Thus, in *Waters*, while the Commission did emphasize that its "minority ownership policy is to be given full application and significant weight in comparative broadcast proceedings," *id.*, and did thereby elevate the significance of the minority enhancement factor above its previous subordinate status as a mere "plus-factor,"

---

[5] In *Waters*, only a single credit was awarded for local residence and civic involvement. See paragraph 6 and note 3, *supra*, for a discussion of why separate credits are analytically more appropriate in the instant case.

*see Garrett Broadcasting Service* v. *FCC*, 513 F.2d 1056 (D.C. Cir. 1975), the Commission did not turn this enhancement factor into a *per se* comparative determinant; it put it on par with the other well-known factors, but not above them. *See HLD & M Communications*, 93 FCC 2d 143, 53 RR 2d 732 (Rev. Bd. 1983); *Las Misiones de Bejar TV Co.*, 93 FCC 2d 191, 53 RR 2d 119 (Rev. Bd. 1983). Hence, we hold that in the instant case, the ALJ erred in construing WSI's deserved substantial minority enhancement preference as decisive "[i]n view of the importance attached to this comparative factor" (I.D., Conclusions, para. 6). In so doing, he gave that factor a *per se* advantage in the evaluation process, which is inconsistent with case precedent. Having reached this conclusion, we must now comparatively weigh all of the enhancement preferences that we have examined in the preceding paragraphs.

11. In summing up the comparative integration enhancements, MSB receives a substantial preference for 100% local residence, a moderate preference for civic participation, and a slight preference for previous broadcast experience. WSI is credited only with a substantial preference for 100% minority ownership. WSI's minority preference is matched by MSB's local residence preference, and the remaining preferences that tip the comparative scale belong to MSB.[6] Thus, we conclude that MSB is entitled to a slight overall ownership integration preference, having prevailed on qualitative enhancement preferences against WSI while being in equipoise on quantitative integration credit.[7]

12. *Comparative Coverage Issue*. Having observed that data submitted by the applicants indicated that there would be a significant difference in the size of the areas and populations that would receive service from the various engineering proposals, the 1982 Hearing Designation Order, *supra* note 1, specified a comparative coverage issue. Under this issue, the ALJ found that each proposed service area already receives five or more daytime primary aural services; however, in terms of nighttime primary services, RJI would provide a third service to 8,454 people (171 more people than MSB and 729 more than WSI) and, if third and fourth new services

---

[6] Where, as here, it is appropriate to award separate local residence and civic involvement preferences (see paragraph 6 and note 3, *supra*), equity dictates that these preferences not be united when final comparative evaluations are made. However, even if they were to be combined herein, we would hold that MSB maintained a slight comparative edge over WSI because MSB's slight preference based on previous broadcast experience. As previously noted in paragraph 4, *supra*, even slight qualitative differences loom large in the close case.

[7] The function of qualitative enhancement factors is to enhance the value of quantitative integration credit. *Absolutely Great Radio, Inc.*, ___ FCC 2d ___ , 55 RR 2d 15, 21 (1983). Where, as here, competing applicants have quantitatively equal integration proposals, a slight overall preference appropriately reflects the impact of superior enhancements on the quantitative equality, for just as qualitative attributes may not overcome a clear quantitative difference, *id.*, so too they may not unduly diminish the significance of quantitative equality.

were combined, MSB would serve 51,853 new people, which is 3,616 more than WSI and 3,788 more than RJI. The ALJ concluded that under *Resort Broadcasting Co., Inc.*, 41 FCC 2d 640, 27 RR 2d 1379 (Rev. Bd. 1973), the existence of five or more daytime services throughout the proposed service area is an "abundance" which precludes a daytime coverage preference, and that the differences in proposed third and fourth nighttime services are *de minimis* under *Colorado West Broadcasting, Inc.*, 57 FCC 2d 526, 35 RR 2d 1637 (Rev. Bd. 1976), and do not warrant a nighttime coverage preference. I.D., Conclusions, para. 1. In response to an exception by RJI urging that it deserved a comparative coverage preference, based on its 171-person third nighttime service superiority, WSI asserts that RJI's minor coverage advantage is not decisionally significant in light of its other shortcomings (see note 1, *supra*), and that, therefore, the ALJ's ruling should be affirmed.

13. While new first and second daytime or nighttime services are matters of prime importance under a comparative coverage issue, *RAM Enterprises*, 57 FCC 2d 844, 35 RR 2d 1507 (Rev. Bd. 1976), *rev. denied*, FCC 76–597, released June 24, 1976, credit is also given for new third and fourth services, albeit generally no more than a slight preference. *CJL Broadcasting, Inc.*, 88 FCC 2d 750, 50 RR 2d 1159 (Rev. Bd. 1981), *reversed on other grounds*, 54 RR 2d 1037 (1983). The *Colorado West Broadcasting, Inc.* case does not hold otherwise. There, the Board acknowledged that provision of a first nighttime service to 617 more people warranted a comparative coverage preference, but held that a 617-person disparity was too small to deserve a "decisive" preference. Here, the question is only whether one of the Jonesboro applicants is entitled to any comparative coverage preference at all. We conclude, based on the ALJ's findings, I.D., para. 20, that MSB warrants a slight preference in this area over RJI and WSI. *E.g.*, *CJL Broadcasting, Inc.*, *supra*; *cf. FBC, Inc.*, FCC 83R-75, released October 6, 1983 (Rev. Bd.) (substantial coverage preference based in part on new third and fourth services to 14,000 people). MSB's provision of new third and fourth nighttime services to 51,853 people is more than 7.5% greater than the proposed new third and fourth services of WSI and RJI (3,616 people more than WSI and 3,788 more than RJI). This differential is well within the bounds of case precedent supporting a slight comparative coverage preference. *CJL Broadcasting, Inc.*, *supra*.

14. *Final Comparative Evaluation*. All exceptions having decisional significance have been considered by the Board. Under the "best practicable service" criterion of the *Policy Statement*, *supra*, MSB has been awarded a slight integration preference and a slight comparative coverage preference; WSI has received no preferences.[8]

---

[8] The ALJ awarded slight preferences to MSB and WSI over RJI for proposing to use auxiliary power. As between MSB and WSI, this preference is not decisionally

Hence, a grant of MSB's application will better serve the public interest, convenience and necessity.[9]

15. ACCORDINGLY, IT IS ORDERED, That the application of MSB Communications Corporation (File No. BPH-811027AC) for a construction permit for a new FM station at Jonesboro, Arkansas, IS GRANTED, and the applications of Radio Jonesboro, Inc. (File No. BPH-810603AG) and Whispering Sounds, Incorporated (File No. BPH-811028AL) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

---

significant. MSB and WSI also received substantial diversification preferences over RJI under the diversification criterion of the *Policy Statement, supra*. These preferences, plus RJI's lack of cognizable integration credit, place RJI as a distant third in the full comparative analysis of this case. See note 1, *supra*.

[9] In view of this result, we need not tarry on MSB's exception to the ALJ's refusal to add false financial certification or lack of candor issues against WSI concerning its financial showings. Memorandum Opinion and Order, FCC 83M-2714, released August 15, 1983. However, MSB's motion to enlarge issues was based essentially on rank speculation and surmise and was properly denied by the ALJ for the reasons set forth in his order.

FCC 83D-59

BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| In re Applications of | |
|---|---|
| RADIO JONESBORO, INC.<br>Jonesboro, Arkansas | BC Docket No. 82-641<br>File No. BPH-810603AG |
| MSB COMMUNICATIONS CORPORATION<br>Jonesboro, Arkansas | BC Docket No. 82-643<br>File No. BPH-811027AC |
| WHISPERING SOUNDS, INCORPORATED<br>Jonesboro, Arkansas | BC Docket No. 82-645<br>File No. BPH-811028AL |
| For Construction Permit for a New FM Station | |

## *Appearances*

*Eugene T. Smith*, on behalf of Radio Jonesboro, Inc.; *Rudolph L. Ennis*, on behalf of MSB Communications Corporation; *Donald E. Bilger*, *Forbes W. Blair* and *Dorothy Graham*, on behalf of Whispering Sounds, Incorporated; and *Arthur I. Steinberg*, on behalf of the Mass Media Bureau, Federal Communications Commission.

# INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN H. CONLIN

(Issued October 27, 1983; Released November 3, 1983)

## *Preliminary Statement*

1. The Commission, by Hearing Designation Order released September 16, 1982, designated for hearing six mutually exclusive applications for a new FM broadcast station at Jonesboro, Arkansas. Thereafter, by an order released January 14, 1983, the Commission designated for hearing another application for the same facilities and consolidated the application into this proceeding. Subsequently, all of the applications were dismissed except for Radio Jonesboro, Inc. (RJI), MSB Communications Corporation (MSB) and Whispering Sounds, Incorporated (WSI). These applicants were found qualified to construct and operate as proposed, but since their proposals were mutually exclusive the following issues were specified:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

Paragraph 4 of the Hearing Designation Order noted that data submitted by the applicants indicated that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the Commission stated that, for the purpose of comparison the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue to determine whether a comparative preference should accrue to any of the applicants.

2. A prehearing conference was held on December 6, 1982 and the hearing was held on April 19, 1983. The record was closed the same day. Proposed findings of fact and conclusions of law were filed on June 20, 1983 and reply findings were filed July 11 and 12, 1983.[1]

## *Findings of Fact*

### *The Applicants*

3. *RJI.* RJI, an Arkansas corporation, is authorized to issue 600 shares of common voting stock of which 377 shares are issued and outstanding. The corporation is comprised of the following officers, directors and shareholders:

| | | | |
|---|---|---|---|
| Harold Crall | President | Director | 15.9% |
| Marie L. Parker | — | — | 23.3% |
| Herbert J. Parker | Vice President | Director | — |
| Bobby G. Wood | Secretary-Treasurer | Director | 4.0% |
| Elizabeth Crall Smith | | | 13.3% |
| Evelyn James Skeen | | | 28.1% |
| Nadine Greyson | | | 10.6% |
| Winnie Farsbee | | | 2.6% |
| C. V. McKinney | | | 2.1% |

4. Of RJI's principals, only Herbert J. Parker and Bobby G. Wood are proposed to be involved in the day-to-day operation of the

---

[1] In *South Florida Broadcasting Co., Inc.*, 53 P&F RR 2d 1683 (1983), the Commission required "all broadcast applicants who are currently prosecuting their applications in hearing proceedings and who initially used the 1977 version of Form 301 but subsequently established their financial qualifications pursuant to the new certification procedure, to make the full documentary showing specified in the 'old' form . . ." 53 P&F RR 2d at 1685. WSI is such an applicant; and pursuant to *South Florida* it submitted an amendment in the form of a bank letter dated June 24, 1983 indicating a willingness by the bank to lend the applicant sufficient funds. The amendment was accepted in an order (FCC 83M-2714) released August 15, 1983.

station. Both, however, would devote less than 20 hours per week to station affairs. Parker and Wood are Jonesboro residents; Parker is a vice president of the Mercantile Bank in Jonesboro and a member of the Jonesboro Rotary Club; Wood is the owner-operator of Delta Gas and Oil Company in Lake City, Arkansas, a member of the University Lions Club, Jonesboro, and an elected State Representative.

5. RJI is the licensee of standard broadcast station KNEA, Jonesboro. Station KNEA operates at 970 kHz with an effective radiated power of 1,000 watts, daytime operation only.

6. *MSB*. MSB is an Arkansas corporation with two principals; J. Murl Smith and O. L. Bayless. Smith has subscribed to 200 shares of stock in MSB and he is a director and its secretary/treasurer. Bayless has subscribed to 100 shares of MSB stock and he is a director and the president of the corporation.

7. Neither MSB nor its principals hold an interest in any medium of mass communications.

8. MSB proposes both of its principals for full-time day-to-day involvement in the management of the proposed station. Smith is proposed as general manager, and in that position he would be "supervising and managing the overall responsibilities of the proposed station, with particular emphasis on business and administrative affairs . . ." (MSB Ex. 3). He proposes to work at the station 40 hours or more per week on an indefinite basis. Smith has resided in or near Jonesboro, Arkansas, since 1957. His current residence is approximately 1 ½ miles south of the corporate city limits of Jonesboro, Arkansas, which is well within the predicted 3.16 mV/m contour of the proposed station. An attorney whose practice is now largely inactive, Smith has been a member of the American Bar Association since 1964 and of the Arkansas Bar Association since 1972. Since 1982 he has been a director with the Craighead County Cancer Association, devoting about one hour per week to this activity. In the past, he was a member of the Jonesboro Rotary Club (1974 to 1976) and secretary of the Lions Club in Jonesboro (1967 to 1968).

9. Though his law practice is no longer active, Smith has a number of business interests. He is president, chief executive officer, a director and 50% shareholder of Wendy's of the South (formerly Wendy's of the Ozarks), consisting of 24 separate fast-food franchises in Mobile, Louisiana, and the Ozarks (Tr. 82–83). He is also president, chief executive officer and 100% stockholder of Tri-Com Developers, Inc., which leases a shopping center located in Trumann, Arkansas (Tr. 91–92); general partner and 81.33% owner of Char-Mur Apartments, also in Trumann (Tr. 92); an officer, director and 66 ⅔% owner of Martindale Chevrolet-Oldsmobile in Missouri (Tr. 93); and vice president, director and majority stockholder of SEMO Kentucky Fried Chicken in Missouri (Tr. 103–104)

10. If MSB is awarded the construction permit, Smith would continue to devote at least 10 to 20 hours a week to his current business interests by continuing to carry out the tasks and duties he presently performs in connection with the 24 Wendy's restaurants (Tr. 96). Moreover, he would continue to effectuate his duties as an officer, director and stockholder of Tri-Com Developers, Inc., Martindale Chevrolet-Oldsmobile, SEMO Kentucky Fried Chicken and Char-Mur (Tr. 101–104).

11. O. L. Bayless is proposed as the full-time station manager. He would be involved in the "day-to-day supervision of all staff activities under the direction of the general manager, with particular emphasis on programming, technical, sales, community affairs, and personnel matters." He would also be responsible for "implementing on a day-to-day basis, policies adopted by the Board of Directors of MSB Communications Corporation" (MSB Ex. 4). As station manager, he would devote 40 or more hours per week indefinitely.

12. Bayless has resided in Jonesboro, Arkansas, continuously since July 1965. He presently is employed as a Professor of Speech Communication at Arkansas State University, Jonesboro, Arkansas, a post he has held since July 1974. Should MSB be the successful applicant in this proceeding, he will either resign his present employment or reduce the number of hours at the University to 20 hours per week.

13. Since July 1982, Bayless has been secretary of the Jonesboro Rotary Club, an activity to which he devotes about one to two hours per week; and since July 1981 he has served on the Rotary District 615 Rotary Foundation Scholarship Committee, an additional Rotary activity to which he devotes approximately one hour per week. He has been a member of the Jonesboro Fine Arts Council since 1980. In the past, he has been a member of the Broadcast Education Association (1959 to 1974) and the American Forensics Association (1965 to 1971), both professional associations; and he has been a member of the Kiwanis Club in Jonesboro (1973 to 1974).

14. From December 1952 to March 1962, O. L. Bayless had a 10% ownership interest in KBHS, Hot Springs, Arkansas. From June 1953 to June 1954, Bayless worked at KBHS as staff announcer and sports director.

15. *WSI.* WSI is a corporation organized and existing under the laws of the State of Arkansas. The corporation has authorized 2,000 shares of no-par common stock, having one vote per share, with a total of 300 shares currently issued. The officers, directors and shareholders of WSI are as follows:

| | | | |
|---|---|---|---|
| Ben McGee | President | Director | 100% |
| Wilbert Gaines | Secretary | Director | — |
| Agnes Kendall | Treasurer | Director | — |

16. None of the principals of WSI holds any interest in media of mass communication.

17. Ben McGee, a black male and WSI's sole stockholder, is the proposed general manager of the station and will devote 40 hours per week to the facility (WSI Exs. 1, 2; Tr. 139, 142). McGee resides in Marion, Arkansas, which is 50–60 miles from Jonesboro. In recent years he has spent considerable time in Jonesboro because of his duties as a member of the Board of Trustees and Foundation Board of Arkansas State University. He anticipates that in the event of a grant, he will maintain an apartment in Jonesboro while maintaining his residence in Marion. McGee has been actively involved in statewide civic affairs, particularly in the field of education (WSI Ex. 2, Att. A) and has specific ties to Jonesboro as a result of his association with Arkansas State University.

18. Following his graduation from college in 1967, McGee served as a compliance supervisor of the United States Agricultural Department. From 1974 to 1977 he served as credit manager for GMAC. In 1977 he established his own business, The Wholesale Liquor Center in West Memphis, Arkansas. Should WSI be awarded the construction permit, The Liquor Center will be managed by Ms. Christine Brownlee, who has served as the assistant manager for the past five years (WSI Ex. 2, p. 4; Tr. 144). During the eight months prior to the hearing, McGee has taken steps to reduce his presence at The Liquor Center and currently is spending approximately 20 hours a week at the store. This would be reduced to 10 to 15 hours per week in the event the WSI application is granted (Tr. 144–146).

19. Wilbert Gaines, a black male and a resident of Jonesboro, is WSI's secretary and a director. He is an Assistant Professor at Arkansas State. Agnes Kendall, the treasurer and a director of WSI, is a black female who is presently a graduate student at Arkansas State. She is also a Jonesboro resident.

### *Comparative Coverage*

20. All of the applicants seek a permit to construct a Class A FM broadcast station on Channel 261. Since the applicants propose to operate from different sites, there are differences in the location and size of their respective primary service contours (1 mV/m). During the daytime, the service area proposed by each applicant receives five or more existing primary aural services. None of the applicants would provide a first or second nighttime primary service. The following tabulation sets forth the areas and populations which would receive a third, fourth and fifth or more primary nighttime aural service from each of the applicants (Joint Ex. 1):

| | *RJI* | | *MSB* | | *WSI* | |
|---|---|---|---|---|---|---|
| *Service* | *Area (sq.mi.)* | *Pop.* | *Area (sq.mi.)* | *Pop.* | *Area (sq.mi.)* | *Pop.* |
| Third | 210 | 8,454 | 214 | 8,283 | 196 | 7,725 |
| Fourth | 218 | 39,611 | 212 | 43,570 | 277 | 40,512 |
| Fifth or more | 67 | 7,494 | 218 | 12,760 | 191 | 12,711 |
| TOTAL | 495 | 55,559 | 644 | 64,613 | 664 | 60,948 |

## *Conclusions*

1. *Comparative Coverage*. Since there is an abundance of existing aural service during the daytime (five or more stations), none of the applicants will be awarded a preference. See *Resort Broadcasting Co., Inc.*, 41 F.C.C. 2d 640, 643 (Rev. Bd. 1973). During the nighttime, none of the applicants provides service to a white or grey area. All of the applicants provide a nighttime service to underserved areas and populations. However, an examination of the amount of nighttime service provided by each of the applicants to their respective underserved areas demonstrates that the differences are *de minimis*. See *Colorado West Broadcasting, Inc.*, 57 F.C.C. 2d 526, 529 (Rev. Bd. 1976). Accordingly, none of the applicants warrants a preference over any of the others with respect to comparative coverage.

2. *Diversification of Ownership of Mass Media*. RJI already owns an AM station in the community of Jonesboro. MSB and its principals have no ownership interests in any existing medium of mass communications; and the same is true of WSI. MSB and WSI are for this reason entitled to a substantial preference over RJI. *Communications Properties, Inc.*, 92 F.C.C. 2d 45 (Rev. Bd. 1982).

3. *Auxiliary Power*. MSB and WSI propose an auxiliary source of power; RJI does not. This difference entitles MSB and WSI to a slight preference over RJI. *New Continental Broadcasting Co.*, 88 F.C.C. 2d 830, 851 (Rev. Bd. 1981).

4. *Integration of Ownership with Management*. RJI proposes no cognizable participation by management in the day-to-day affairs of the proposed station.[2] Both MSB and WSI propose 100% full-time participation by their owners in day-to-day management. Both, therefore, are entitled to a substantial preference over RJI. From the foregoing, it is clear that MSB and WSI are substantially superior to RJI on an overall basis and that the choice between the two must be determined through an analysis of their integration proposals.

5. As indicated above both MSB and WSI intend that their principals will be involved in station management on a full-time basis. Each attempts to disparage the other's proposal on the ground that it is unlikely to be carried out: WSI contends that Bayless and

---

[2] The only stockholder who would be active in station management is Bobby G. Wood, a 4% shareholder, who would devote less than 20 hours per week to station affairs, a participatory role too small to be credited. *Midwest Broadcasting Company*, 70 F.C.C. 2d 1489, 1494–1495 (Rev. Bd. 1979).

Smith of MSB have other business or professional interests which will interfere with their commitment to devote 40 hours per week to the station's affairs; and MSB argues that McGee's liquor business and the fact that he resides in Marion, Arkansas will preclude him from spending full time (i.e., 40 hours weekly) to managing a station in Jonesboro. On the basis of the evidence the presiding officer is persuaded that both proposals were made in good faith and that they are capable of effectuation. Bayless and Smith will curtail their present activities so that they will occupy no more than 20 hours of their time per week. The record provides no reason to believe that the arrangements they have made are not feasible, and accordingly MSB's proposal will be credited. See *Central Texas Broadcasting Co., Ltd.*, 90 F.C.C. 2d 583, 586 (Rev. Bd. 1982). The same conclusion is warranted with respect to WSI. McGee has made plans to turn over additional managerial responsibilities of his business to a long-time assistant; and the distance between Jonesboro and Marion is relatively short (less than an hour's driving time). These considerations and his intent to acquire living quarters in Jonesboro render his proposed integration entirely credible.

6. From a qualitative standpoint MSB's proposal is enhanced by the local residence of Smith and Bayless. Similarly, their civic activities in Jonesboro, though not extensive, are entitled to some weight.[3] Though not a resident of Jonesboro, McGee has been actively involved in the affairs of Arkansas State University, a local institution, and for this some credit is accorded WSI. A slight preference is nonetheless given to MSB. A further factor and one "entitled to substantial enhancement credit" arises from McGee's status as a member of a minority group. *Waters Broadcasting Corporation*, 91 F.C.C. 2d 1260, 1264 (1982). In that case the Commission held that "[m]inority ownership is . . . a valid and, indeed, highly meritorious consideration" in a comparative proceeding since "there is a critical underrepresentation of minorities in broadcast ownership," *id.* at 1264. In view of the importance attached to this comparative factor, it is deemed sufficient to overcome MSB's local ownership preference and its slight advantage in civic participation. WSI is therefore preferred for the qualitative aspects of its integration proposal, and since the applicants are quantitatively on an equal footing it is concluded that WSI's overall integration entitles that applicant to a preference.

7. To summarize, both MSB and WSI are markedly superior to RJI. Neither applicant has any ownership ties to existing media of mass communication and both propose 100% full-time participation by ownership in the management of the proposed station. The

---

[3] Note is also taken of Bayless' one-year employment as a radio announcer in 1953-54, though this limited experience and the "minor significance" (*Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 396 (1965)) of the broadcast experience criterion itself render this matter of little decisional importance.

decisive factor in the case is WSI's 100% minority ownership, and for this reason a grant will be made to that applicant.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Whispering Sounds, Incorporated IS GRANTED and the mutually exclusive applications of Radio Jonesboro, Inc. and MSB Communications Corporation ARE DENIED.[4]

FEDERAL COMMUNICATIONS COMMISSION
JOHN H. CONLIN, *Administrative Law Judge*

---

[4] In the event exceptions are not filed *within 30 days after the release of this Initial Decision*, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Operator Requirements
RAdiotelegraph Operator
Radiotelephone Operator Requirements

**Modification or elimination of certain Commission rules that require licensed commercial radio operators in the Experimental, International, and Auxiliary Broadcast Services; elimination of the requirement that licensed commercial radio operators perform certain duties in the Private Radio, Domestic Public Fixed, and Cable Television Relay Services; and changes in commercial radio operator licensing procedures and policies.**
*–Radio Operator Requirements*
Gen. Docket No. 83–322

FCC 84–56

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| In the Matter of<br>Requirements for Licensed Operators in Various Radio Services | RM-3292<br>RM-2643<br>General Docket 83–322 |
|---|---|

## REPORT AND ORDER
(PROCEEDING TERMINATED)

(Adopted: February 24, 1984 Released: May 3, 1984)

BY THE COMMISSION: Commissioner Quello concurring and issuing a statement.

### I. *INTRODUCTION*

1. On April 20, 1983, the Commission released a *Notice of Proposed Rule Making* in General Docket 83–322 (*Notice*), FCC 83–113, 48 Fed. Reg. 22591 (May 19, 1983), that proposed changes in certain rules contained in Commission Rule Parts 13, 21, 73, 74, 78, 90, 94 and 95. The *Notice* requested comments on the proposed modification and, in certain instances, elimination of Commission rules that require licensed commercial radio operators in the Experimental Broadcast, International Broadcast, and Auxiliary Broadcast Services; the elimination of rules that permit only licensed commercial radio operators to perform certain duties in the Private Land Mobile and Fixed, Personal, Domestic Public Fixed, and Cable Television Relay Services; the issuance of General

Radiotelephone Operator Licenses for a lifetime term; extension of the renewal grace period from one year to five years for commercial radio operator licenses that would continue to require renewal; abolishment of the restrictive endorsement placed on commercial radio operator licenses held by blind persons; elimination of the requirement that the holder of a Third Class Radiotelegraph Operator Permit repeat the Morse code tests when applying for a Second Class Radiotelegraph Operator License after one year has elapsed; and the abolishment of the Aircraft Radiotelegraph Endorsement. We have analyzed and considered all of the comments and correspondence received regarding this proceeding, revisited each of our proposals as set forth in the *Notice*, and taken cognizance of recent legislation enacted by Congress relating to several of the proposals. For the reasons discussed below, it is our view that the public interest will best be served by adopting most of the proposals as set forth in the *Notice* regarding this matter. We are, however, adopting modifications of our proposed rule changes regarding elimination of the requirement for licensed radio operators in the Personal Radio Services and taking certain additional actions related to those changes and to the proposal to issue General Radiotelephone Operator Licenses for a lifetime term.

## II. *BACKGROUND*

2. Two primary goals of the Commission are to create, to the maximum extent possible, an unregulated, competitive marketplace environment for the development of telecommunications and to eliminate unnecessary regulations and policies. As reflected in the *Notice*, we are continuing to review all of our rules and regulations with these as well as other major objectives in mind. This Docket was initiated as another step in a series of proceedings that have examined our rules and procedures regarding commercial radio operator licenses or the requirements for such licenses as contained in Commission rule parts concerning various services. The *First Report and Order in the Matter of an Inquiry Relating to the Commission's Radio Operator Licensing Program*, Docket No. 20817, 44 Fed. Reg. 1733 (January 8, 1979), 70 FCC 2d 2371 (1979), reduced the requirement for duty operators at AM and FM broadcast stations, except at those AM stations with critical directional antennas, to those holding any class of commercial operator license, including the Restricted Permit, in lieu of the Radiotelephone Third Class Operator Permit Endorsed for Broadcast Operation. The *Second Report and Order* in Docket No. 20817, 44 Fed. Reg. 66816 (November 21, 1979), authorized TV and directional AM stations to employ any class of operator for routine operations, provided the stations employ at least one First Class operator, and, collaterally, reduced the requirement to employ a "Chief" First Class operator from full-time to whatever less than full-time the licensee deter-

mined was necessary to maintain station compliance with our technical standards. The *Third Report and Order* in that same Docket, 45 Fed. Reg. 52154 (August 6, 1980), abolished the Radiotelephone Third Class Operator Permit and instituted the Marine Radio Operator Permit in its place where safety considerations or international agreements dictated a continuing need for licensed operators, primarily aboard Great Lakes freighters and certain charter fishing vessels. The *Fourth Report and Order* in Docket No. 20817, 46 Fed. Reg. 35450 (July 8, 1981), 87 FCC 2d 44 (1981), repealed rules that required operators who repair broadcast transmitting equipment to hold a Radiotelephone First Class Operator License; terminated the Radiotelephone First Class examination and license, renamed the Radiotelephone Second Class Operator License as the General Radiotelephone Operator License, and revised the broadcast rules to permit the holder of any class of commercial license, including a Restricted Radiotelephone Operator Permit, but excluding the Marine Radio Operator Permit, to maintain as well as operate broadcast transmitting equipment. More recently, in our *Report and Order in the Matter of Amendment* of Part 5 of the Commission's Rules to Diminish Restrictions on *the Licensing and Use* of Experimental Stations (Other Than Broadcast), Gen. Docket No. 82–469, FCC 83–471, released November 16, 1983; 48 Fed. Reg. 52733 (November 22, 1983), and In the Matter of *Revision and Update of Part 22 of the Public Mobile Radio Services Rules*, CC Docket No. 80–57, FCC 83–476, released December 19, 1983; 49 Fed. Reg. 3296 (January 26, 1984), the Commission, among other matters, eliminated the requirements that station operators and maintenance technicians in the Experimental Radio Services and in the Public Mobile Radio Services hold commercial radio operator licenses. In both of these proceedings, as in Docket 20817, we stressed the responsibility of licensees for ensuring the proper operation of their stations.

3. In the *Notice* concerning this matter, we expressed our belief that the specific rule requirements that we proposed to delete were unnecessary and would have no significant adverse impact on the quality or efficiency of communications in the radio services involved.

## III. *OVERVIEW OF COMMENTS*

4. The Commission received more than 200 formal and informal comments and reply comments concerning this proceeding. While comments solicited by the *Notice* were due June 20, 1983 and reply comments July 20, 1983, we are granting a motion by the Associated Public-Safety Communications Officers, Inc. for acceptance of late-filed comments filed with the Commission on June 28, 1983. Additionally, we note that the *Notice* generated an extremely large amount of correspondence to the Commission, including Congressional letters and referrals. A considerable amount of the correspon-

dence was received after the due dates for comments or reply comments, and many of the Congressional letters and referrals requested that consideration be given to the views and concerns of constituents. Therefore, in view of the substantial interest in this Docket and for the purpose of developing a full record regarding the proceeding, we are associating all pertinent correspondence received by the Commission, irrespective of the date received or filed, with the Docket in this matter and taking all comments contained therein into consideration.

5. Among the organizations who filed comments and/or reply comments in this matter were: the American Association of State Highway and Transportation Officials; American Telephone and Telegraph Company (AT&T); Associated Public-Safety Communications Officers, Inc. (APCO); the Association of American Railroads; the California Public-Safety Radio Association, Inc.; the California State Office of Telecommunications; the Central Committee on Telecommunications of the American Petroleum Institute (CCTAPI); the Chicago Police Department; the City of Dallas; FARINON Division of the Harris Corporation (FARINON); Forest Industries Telecommunications (FIT); the General Electric Company; GTE Service Corporation (GTE); the Indian State Police; the City of Indianapolis Police Department; the Iowa Department of Public Safety, Division of Communications; the County of Los Angeles Department of Communications; the Maryland State Police, Electronic Services Division (MSP); the Michigan Department of Natural Resources; the Michigan Department of State Police (MDSP); Motorola, Inc. (Motorola); Multimedia, Inc. (Multimedia); the National Association of Broadcasters (NAB); the National Association of Business and Educational Radio (NABER); the National Association of Radio and Telecommunications Engineers, Inc. (NARTE); the City of Newport News; the North Carolina Highway Patrol; the Northern California Chapter of the Associated Public-Safety Communication Officers, Inc.; the City of Port Huron; the City of Portland; TACTEC Systems, Inc. (TACTEC); and the Utilities Telecommunications Council (UTC). In addition to the organizations specifically identified above, a large number of other comments, correspondence, and congressional referrals were received from individuals who hold commercial radio operator licenses, two-way radio service and repair shops, commercial businesses that are licensed users of two-way radio communications, utility companies, and other municipal and county law enforcement agencies. The comments are discussed in more detail below, but it is generally noted that almost every comment or correspondence received in this matter was primarily concerned with and vigorously opposed to the Commission's specific proposal to eliminate rules that permit only licensed commercial radio operators to perform certain duties in the Private Land Mobile Radio and Private Operational-Fixed Microwave Services.

6. We further note, initially, that the comments of both NARTE and TACTEC opposed, in general, elimination of the requirement for General Radiotelephone Operator Licenses in all of the various rule parts specified in the *Notice*. NARTE stated that, in view of the importance of licensed personnel in ensuring the quality of radio transmissions, withdrawal of the license requirement would be contrary to the public interest and would exacerbate the technical problems resulting from increased spectrum congestion. It favored retention of the license requirement as a means of ensuring a certain level of technical competence and as a reliable basis to determine the threshhold qualifications of applicants for employment as engineers and technicians. TACTEC asserted that elimination of the license requirement would cause an influx of unqualified technicians and unqualified general repair shops. GTE, while generally opposed to the Commission's proposal to delete the requirements for licensed commercial radio operators due to its concern for stability of operation and quality of service, also noted that the considerations applying to each general type of service involved in the *Notice* are different, and implored the Commission to base its actions on more carefully considered judgments than mere analogy to broadcasting.

## *BROADCAST SERVICES*

7. In the *Notice*, we set forth a summary of our current requirements for licensed operators in the broadcast and broadcast-related services; referred to our previous Docket 20817; discussed the inconsistencies between present licensed operator requirements in the Broadcast Service and the International Broadcast, Experimental Broadcast, and Auxiliary Broadcast Services; and proposed to further modify our operator requirements for stations licensed under Parts 73 and 74 by allowing the statutory requirement of a licensed operator for all broadcast stations[1] licensed under Part 73 and 74 of our rules to be satisfied by a person who holds any class of commercial radio operator license or permit, unless that license or permit is otherwise endorsed. We also proposed to delete the requirements in Part 73 for a licensed operator for the operation or maintenance of Instructional Television Fixed Service Stations, Broadcast Remote Pickup Stations, Aural Broadcast STL or Intercity Relay Stations, TV Broadcast Auxiliary Stations, or Low Power Auxiliary Stations since these types of stations are not used to broadcast directly to the public and do not, for the most part, operate in the broadcast frequency bands.

8. Of the comments filed in this proceeding, relatively few addressed the broadcast service proposals. NAB supported the Commission's proposals related to the broadcast services as being in the public interest and noted that none of the dire consequences

---

[1] See Section 318 of the Communications Act of 1934, as amended, 47 U.S.C. §318.

previously predicted by opponents in Docket 20817 have materialized. It further asserted that it believes that the same rationale that justified the Commission's earlier action even more strongly supports the elimination of operator licensing requirements for the broadcast-related services. NAB stated:

> The broadcast industry has demonstrated that liberalized operator licensing requirements have in no way reduced the quality of service provided to the public but have, instead, given broadcasters new freedom to use their resources where they are most needed to service their respective communities.
>
> We know of no significant increase in violations of the Commission's technical standards which could be attributed to the 1981 licensing revision. Thus, we agree that it makes little sense to retain technical licensing requirements for the broadcast auxiliary services when there are no similar requirements for the broadcast service itself. As the Commission has pointed out, it is inconsistent to require the operator of an aural STL, for example, to hold a technical license when the operator of the main transmitter need not hold such a license. Broadcasters have proven that they can comply with the rules without federally-mandated technical licensing for those who operate their station transmitters. They are equally able to secure competent operators for their auxiliary services without a licensing requirement. Deleting those obsolete licensing requirements and the associated paperwork will free broadcasters to better utlize their employees' time and talents.[2]

Multimedia, in its comments, also supported the Commission's proposals relating to the broadcast services for similar reasons. GTE counseled that since it has been two years since the Fourth Report and Order in Docket 20817 that allowed the lowest-level commercial operator license as qualification to install, maintain, repair and technically supervise AM, FM and TV broadcast transmitting equipment, the Commission should review carefully its experience with technical violations to determine whether there has been any applicable increase, and expressed its opinion that the treatment of broadcast auxiliary stations should be consistent with that of broadcast stations. Several individuals who hold commercial radio operator licenses opposed the proposals concerning the broadcast services. The comments of Mr. Marvin A. Whitaker, Somerset, Kentucky, transmitter chief at an educational public television station, were representative of these and stressed that removing the requirement for the higher class of license would result in elimination of the last influence for good technical operation, and the gravitation of competent personnel to other fields with a resultant degradation in broadcast station technical performance.

## *PRIVATE RADIO SERVICES*

9. In the *Notice* concerning this proceeding, the Commission noted that currently, with a few exceptions, only persons who hold a valid General (or First or Second Class) Radiotelephone Operator

---

[2] Comments of NAB at 3–4.

License may take responsibility for the installation, service, or maintenance of transmitters and for certain operating duties in the Private Land Mobile Services, the Private Operational-Fixed Microwave Service, and the Personal Radio Services. We indicated our awareness that the land mobile community is generally opposed to the removal of the requirements and our realization that knowledgeable service and installation technicians are often relied upon by our licensees in the Private Land Mobile Radio Services to advise them about our technical and administrative requirements. The Commission, however, expressed its belief that it is the station licensees themselves who are ultimately responsible for the control and proper operation of their stations, and that it appears to us that these station licensees should and can have the freedom to utilize whatever measures they deem appropriate to ensure that their stations are operated, serviced, and maintained in accordance with the Commission's technical rules and type-acceptance standards. We, therefore, proposed to abolish all rules requiring that transmitter maintenance, adjustment, and servicing in the Private Land Mobile, Private Operational-Fixed Microwave, and Personal Radio Services, be performed only by persons holding a commercial radio operator license.

10. As previously noted, almost every single comment filed in this proceeding specifically addressed and vigorously opposed this proposal. The commenters asserted a variety of reasons why the Commission should not abolish the commercial operator requirements in the private land mobile and fixed services including the potential for greatly increased interference and reduction of signal quality in these services; the effect of resultant interference and signal problems on the public safety radio services in particular; that broadcasting and these radio services are inherently different and cannot be equated; that users rely heavily upon the Commission's operator requirements since they lack the technical expertise to properly maintain or service their equipment; that users encounter difficulty, even with the present requirements, in obtaining qualified trained technicians; that elimination of the requirements would impose financial burdens on users in developing replacement standards; that licensed technicians in these services substantially assist the Commission in "policing" the services and in preventing interference and substantive rule violations; that deletion of the requirement would impose a greater burden on Commission resources in resolving the proliferation of interference problems that would occur; that elimination of the license requirements would be a "rebuff" to professional technicians who have worked diligently to obtain their professional credentials; and that such an action by the Commission will have an adverse effect upon the incomes of licensed technicians and thereby seriously affect their livelihood. Several of the commenters suggested possible alternative approaches to present

Commission licensing procedures. The following references to specific comments are representative of the concerns and suggestions expressed.

11. Regarding the potential for greatly increased interference, virtually all of the commenters opposed to this proposal expressed the opinion that elimination of the operator license requirement for maintenance, service, and repair would result in extremely egregious problems in these services. CCTAPI stated:

> Equipment design has advanced at an incredible pace in recent years; and, as a consequence, some maintenance can be performed with the simple replacement of a printed circuit board. Nevertheless, even modern equipment with synthesized tuning and a growing variety of both narrowband and broadband emissions, as well as digital modulation, present maintenance problems that require the attention of trained personnel. The Commission should not overlook the fact that there are still in operation many varieties of older tube-type equipment that should also be maintained by a qualified technician. For the Commission to simply respond by stating that it is the licensee's responsibility to employ qualified maintenance personnel ignores the true need for a federal program. Certainly, there are many licensees who will ascertain that their equipment installation and maintenance is being performed by qualified personnel. There are hundreds of thousands of licensees in the Private Land Mobile Radio Services, however, and it is not at all clear that each licensee will accept this responsibility with the degree of commitment necessary to protect the public's interest. The malfunction of a few pieces of equipment can interfere with the ability of co-channel licensees to complete critical communications. This same co-channel consideration is not applicable in the broadcast services where most assignments are made on a geographically exclusive basis. However, failure of a licensee to properly discharge its responsibility in the mobile radio services can have a significant impact on other members of the public that share the same channel.[3]

12. Motorola implored the Commission to recognize that unlike mass media and most of common carrier, there are literally thousands of private systems co-existing in an extremely limited amount of spectrum; that these operations are not only spaced relatively close together in relation to adjacent channel systems, but in the vast majority of cases, share their own frequency with numerous co-channel licenses in a given operating area; and that under the best of circumstances, when all licensees use Commission licensed technicians and endeavor to operate their systems in full compliance with the Commission's rules and regulations, interference problems arise because of the sheer volume of transmissions. Motorola expressed its opinion that should even a small minority of users, because of a lack of technical expertise or desire to reduce expenses, employ unqualified technicians, the incidence of equipment-related interference problems would escalate sharply. It asserted that technicians licensed by the Commission almost invariably have the expertise and the incentive to ensure that private radio equipment operates properly. It also questioned the wisdom of the

---

[3] Comments of CCTAPI at 5–6.

Commission in deleting the operator licensing requirement while simultaneously pursuing broad deregulation of technical standards in Docket 83–114, a Re-Examination of Technical Regulation. Motorola stated that the changes proposed in Docket 83–114 are so sweeping and are so logically related to this proceeding in the sense that as technical regulations are loosened, meeting remaining standards becomes increasingly critical, that it urged the Commission to delay action on this docket until it has satisfactorily resolved the questions posed in Docket No. 83–114.

13. NAB asserted that in the increasingly dense electromagnetic environment of broadcasting, private radio and other services, the potential for damaging interference is greater than ever before and stated the following:

> While we support the continued reliance on marketplace forces to assure licensee compliance with the Commission's technical rules as they relate to broadcasting, the Commission should consider the fact that marketplace forces do not always provide a similar incentive for compliance in every service. Indeed, in certain private radio services, marketplace forces may militate against compliance with the Commission's technical standards. To abandon the licensing requirements in these services is an invitation for the unqualified—and unscrupulous—to profit by providing inept and unlawful equipment adjustments for persons who cannot reasonably be expected to know whether the adjustments are lawful or unlawful. . . .
>
> As the Commission has noted, many leaders in the private radio services oppose the deregulation of operator licensing requirements in their own services. We share their concern.[4]

14. APCO stated that it considers this proposal extremely alarming and urged the Commission to recognize that, if implemented, it will have a severe adverse impact upon all the private radio services, and especially the public safety radio services whose safety-of-life and property purposes the Commission is obligated to promote. It further stated:

> APCO does not dispute, of course, the fact that station licensees, rather than the technicians they hire, are responsible for proper operation of their private radio stations. Acceptance and discharge of this responsibility by individual licensees in all the services is key to the successful daily operation of the vast numbers of communications systems which network the entire country and the seriousness with which this responsibility is undertaken is evidenced by the relatively minimal number of instances in which Commission intervention is necessary to enforce its rules.
>
> APCO strongly disagrees, however, that a logical conclusion to be drawn from this fact is that the requirements for licensed commercial radio operators in certain services are rules "which are no longer necessary" and that their elimination is required in order to afford station licensees the "freedom" to discharge this responsibility as best they deem appropriate. To the contrary, Commission oversight and involvement in the qualifying of radio operators and its requirement that only such licensed operators perform important mainte-

---

[4] Comments of NAB at 2–3.

> nance and service functions are minimal, nonburdensome regulations which actually further its general deregulatory aim as Commission involvement at this level better ensures that proper operating standards will be maintained and that its later intervention will not be required. Moreover, the requirements are an indispensable aspect of the Commission's obligation to oversee and foster efficient use of the spectrum and assure its continued availability for priority communications needs such as the provision of public safety services. For these reasons, APCO strongly urges the Commission to recognize that the requirements for licensed operators in the Private Land Mobile and Private Operational-Fixed Microwave Services are not the type of unnecessary and overburdensome regulations that should be eliminated and that it should refrain from abolishing these requirements as it has proposed.[5]

15. The Chicago Police Department contended that adoption of this proposal would lower the standard of technicians because there would be no criteria to judge their competence. It stated that a competent radio technician in the Public Safety Sector is extremely important because the standards of radio communications during possible life and death situations cannot be relaxed or compromised and further suggested that the Commission-administered test for the license be revised and improved to reflect present-day technology.

16. The Michigan Department of State Police indicated its vigorous opposition to this proposal and stated:

> The majority of cases of interference we have received to our system have come from transmitters that were misaligned by unqualified technicians and/or not given the proper attention by the licensee. In a recent case, a business service mobile was put in service at a fixed site as a base station with no tuning of the transmitter. The result was spurious emissions that blocked one of our receivers on our mobile channel. It was necessary for us to expend a great deal of time to locate this transmitter and convince the licensee to make corrections. To expect the licensee to keep a radio system operating properly without the advice and service of a technician familiar with FCC rules and transmitter tuning procedures is impractical. Our experience has shown this will not happen.[6]

17. FIT opposed the Commission's proposal and observed that the *Notice* did not spell out a Commission commitment to devote greater resources to inspection and monitoring that would be needed if unlicensed personnel were to be allowed to repair, maintain and install telecommunications equipment, and suggested that such a commitment should be made if the proposed regulation is adopted.

18. In both its comments and reply comments, NABER vigorously opposed Commission elimination of the existing technician requirements as a disservice to the public interest in that it substantially affects the quality of radio service available to the end user. In its reply comments, NABER reported on the results of a survey it conducted of land mobile radio dealers which disclosed that 87% of those responding did not support the Commission's proposal to abolish the rules requiring only the holder of a commercial radio

---

[5] Comments of APCO at 3–4.

[6] Comment of MDSP at 1.

operator's license to perform the maintenance, adjustment and servicing of a radio transmitter and that 75.4% required a General Radiotelephone License as a prerequisite for employment. In its comments, NABER further stated:

> In fact, NABER maintains that some certification process for private radio equipment technicians is of such importance to the end user, as a consumer of communications service, that NABER proposes an alternative to the commercial operator licensing requirements, should they be eliminated. In the alternative, NABER proposes that a representative industry group or groups administer a certification exam to all individuals seeking to operate and maintain equipment in the private radio services. To accord this certification exam the appropriate level of reliability, NABER recommends that the Commission officially approve both the certification exam and the industry group charged with the exam's administration. This type of industry self-regulation is used in other industries and is in keeping with the deregulatory spirit expressed by the Commission in this and other proceedings.[7]

19. NARTE, in its comments, addressed the possibility of licensing by the private sector. It stated the following:

> If the Commission no longer wishes to devote the funds and resources to maintain and enforce its licensing program, NARTE recommends that the licensing activity be shifted to the private sector. Importantly, adoption of this recommendation would reduce Commission costs while simultaneously ensuring that only skilled engineers and technicians are allowed to operate transmitting equipment and systems.
>
> Accordingly, in the event that the Commission wishes to curtail its licensing activity, NARTE proposes that the Commission retain the requirement that only licensed engineers and technicians be allowed to perform work on radio transmitting equipment and systems and certify non-governmental entities to develop and administer an equivalent or improved General Radiotelephone Operator License examination. NARTE believes that were the Commission to relinquish its responsibility of carrying on the licensing activity, licensed engineers and technicians should develop an alternative method of testing and screening future radio system engineers and technicians to ensure that all engineers and technicians possess the necessary basic skills and comprehension. NARTE is willing to work with the Commission and other organizations and entities to develop a satisfactory testing instrument.
>
> NARTE believes that the industry could devise fair and sophisticated means of determining technical competence in a meaningful way and is committed to ensuring that the radio industry does not experience a decline in the high technical quality that is demanded of radio system engineers and technicians. The incentives to ensure that applicants for technical positions are fully qualified, combined with the desire of present operators to maintain the high standards of their profession, undoubtedly will lead to an appropriate form of testing designed and administered by private industry. As station licensees are ultimately responsible for the control and proper operation of their stations, this necessarily means that station licensees must require that persons applying for positions as radio telecommunications system engineers or technicians be able to show that they possess the knowledge and skills necessary to ensure the proper operation of the stations and system involved. Thus, NARTE feels that Commission withdrawal from administering and enforcing the license require-

---

[7] Comments of NABER at 5.

> ment should be accompanied by a plan that provides for non-governmental entities in updating, upgrading, and administering the General Radiotelephone License examination or its equivalent and retention and certain expansion of all existing license requirements.[8]

At a later point in its comments, NARTE further stated:

> Allowing private entities to devise and administer the General Radiotelephone License examination, or an improved successor, is an appropriate mechanism for ensuring that qualified personnel engineer and work on radio transmitting equipment and systems. Under the framework recommended by NARTE, the Commission would certify and legitimize private entities to devise and administer the test. Importantly, certification of private entities to devise and administer the General Radiotelephone License examination or an improved successor and issue licenses must be viewed as an *official* replacement of the Commission's radio operator licensing program and not a *voluntary* industry (or private sector) effort. Thus, an unlicensed engineer or technician would be required to obtain a license from a Commission-certified private entity before the engineer or technician would be allowed to engineer or work on radio transmitting equipment and systems in the enumerated radio services. Recognition of an outside licensing program would provide an effective transition from any Commission decision to discontinue federal licensing requirements and maintain the high caliber of radio engineers. The Commission should welcome an industry-sponsored program which can assume the responsibilities previously held by the Commission while not compromising the integrity of radio telecommunication systems and their transmissions.
>
> One of NARTE's goals is to continue and upgrade the testing and certification process in order to maintain standards by which a measure of proficiency may be established. In this respect, NARTE is developing a tiered testing and certification structure that could suitably replace the Commission's license structure to provide testing and certification of radio telecommunications technicians and engineers at various skill levels and in various specific areas of radio and telecommunications.
>
> Although NARTE will be looking to be one of the entities that the Commission certifies to devise and administer the examinations, NARTE also encourages the Commission to certify other qualified entities to perform this function. The private entities must be barred from engaging in any discriminatory or arbitrary conduct and must be composed of industry peers. In addition, NARTE believes that any Commission rules providing for certification of non-governmental entities to administer the General Radiotelephone License examination must ensure that the standards and procedures established by the non-governmental entities be established in an objective manner, so that the standards and procedures do not amount to anticompetitive devices for excluding potential competitors. Explicit restrictions must be placed on the non-governmental entities in order to eliminate any potential anticompetitive problems which might be an outgrowth of the entities' activities.
>
> Allowing non-governmental entities such as NARTE to carry out the licensing activity will result in a savings of Commission resources while simultaneously ensuring competence and recognition for qualified radio telecommunications engineers and technicians. In addition, the use of private entities to carry on the licensing activity will not compromise the development of a competitive

---

[8] Comments of NARTE at 9–11.

telecommunications marketplace and indeed will enhance it through the increased skill levels available through the appropriate certification program.[9]

20. Several other commenters who strenously opposed this particular proposal also addressed possible alternatives. UTC stated that in the event that the Commission decided that the license examination would be offered on a limited basis or will only be offered to fulfill international obligations, it recommends that the Commission take appropriate measures to certify well-qualified, non-governmental entities to devise and administer the license examination and to maintain the requirement that only licensed technicians be allowed to perform work on radio transmitters in the Private Land Mobile and Private Operational-Fixed Microwave Services. UTC further stated that recognition of Commission-certified private entities would be a suitable replacement for the federal licensing scheme and would perpetrate the high level of technical skills and training required of General Radiotelephone Operator Licensees. Motorola commented that if the Commission is convinced that this area should not be subject to governmental regulation, but rather should be governed by marketplace force, then it encourages the Commission to sanction an industry effort to assume responsibility for administering such a program; that the land mobile community, in this instance the marketplace, has objected vigorously to deletion of this requirement; that the marketplace apparently believes that there is significant value in having a mechanism which enables private users to make an intelligent, informed choice when hiring a technician; that under these conditions it would be entirely appropriate for the FCC to limit its involvement to official recognition of an industry sponsored program; and that this would allow the Commission to divorce itself from any regulation of technician licensing, yet ensure that private systems will continue to be served by competent personnel.

21. Regarding alternatives, APCO, in its reply comments, noted that the many comments received in this proceeding evidenced overwhelming opposition to the Commission's proposals with respect to the Private Radio Services and left the Commission with no choice but to retain its licensed operator requirements for the services. APCO further stated that it is precisely because of the importance of the functions performed by licensed operators that, contrary to the suggestions made by a few of the commenting parties, the Commission should not relinquish any part of its regulation of these operators to the private sector. It asserted that the qualifying and licensing of technical operators who carry the practical responsibility for ensuring a station's compliance with Commission technical standards is only appropriately performed by the Commission itself, and that while Commission sanction or certification of some sort of

---

[9] Comments of NARTE at 14-17.

industry-devised testing and licensing procedure might be better than nothing, it would be little better, and more importantly, it would not be good enough. APCO contended that not only would any such system be vulnerable to the inequities and competitive pressures inherent in the private sector, but that the Commission as a taxpayer-supported, expert agency of the federal government is the entity most reasonably situated and well-equipped to perform these important functions; that though the retention of the licensed operator requirements for the Private Land Mobile and Operational-Fixed Microwave Radio Services and the concomittant functions of testing and license-issuing will admittedly require the devotion of a certain amount of Commission resources, the benefits of this system are well worth the price and could not possibly be duplicated in the private sector on an equivalent cost basis. It asserted that even more importantly, however, the significance of these functions to the Commission's regulatory scheme and the continued smooth operation of land mobile and operational-fixed microwave communications demand that they be performed by the regulating entity rather than the regulated.

22. Two of the comments filed in this proceeding supported the Commission's proposal to delete the license requirement in these services. AT&T, commenting only on elimination of the license requirement in the Private Radio Services as well as in the Domestic Public Fixed and Cable Television Relay Services, referred to other services where no such requirement exists and contended that there has been no noticeable adverse impact on the quality of those services. It attributed the lack of adverse impact in those services to the fact that it is in the best interests of a station licensee to ensure that the station is properly operated and maintained; asserted that as a result, the station licensee has a strong incentive to employ only qualified people to perform transmitter operations, maintenance and repair activities; and contended that in view of the incentive, it is unnecessary to ensure operator qualifications by requiring such individuals to hold a certain grade of operator license. FARINON, commenting primarily on the proposal as it relates to the Private Operational-Fixed Microwave Service, supported the Commission's proposal and stated that reliable manufacturers are and will continue to produce equipment of the type and quality to minimize a need for full field adjustments; that there is and will continue to be a substantial reduction in the need for skilled technicians; and that there is a continuing trend toward reliance on module replacements in lieu of in-field adjustments and "tweaking" which reduces the need for skilled technicians to operate and maintain private microwave systems. It also asserted that a review of Docket 20817 reflects that the comments filed in that proceeding were replete with examples of stations functioning very well without technical personnel and only occasional resort to outside engineers for major

maintenance or repair. FARINON maintained that while Docket 20817 pertained to broadcast stations, the same thrust concerning reputable manufacturers producing reliable equipment can be extended to the Private Operational-Fixed Microwave Service as well.

## *OTHER SERVICES*

23. We also proposed to delete the requirements for licensed commercial radio operators from Part 78 of our rules and regulations, governing the Cable Television Relay Services, and from Part 21 of our rules and regulations concerning the Domestic Public Fixed Service. We indicated that we were not proposing to change our licensed operator requirements in the Maritime, Aviation, or International Fixed Public Radiocommunications Services. These are international radio services, and, as stated in the *Notice*; we believe that, at a minimum, certain implicit operator licensing obligations do exist.[10]

24. As previously noted, AT&T, in its comments, supported the Commission's proposal regarding these services. No other comments filed specifically addressed these services in terms of strong opposition to or support of the Commission's proposals.

## *OPERATOR LICENSING PROCEDURES*

25. The Commission proposed, in the *Notice*, to issue General Radiotelephone Operator Licenses for a license term concurrent with the lifetime of the holder. We expressed our view that since the vast majority of General Radiotelephone Operator Licenses are currently used in the United States, rather than on the high seas or abroad, we believe it is unnecessary to require updated identification data on General Radiotelephone Operator Licenses and that enforcement and record updating functions of the renewal process are not worth the cost associated with processing renewal applications. We also proposed to lengthen the renewal grace period from one year to five years for commercial radio operator licenses that would continue to require renewal rather than to continue processing routine grants of requests for waivers; to abolish the restrictive endorsement that we have placed on commercial radio operator licenses held by blind persons and leave the determination of whether blindness would be an impediment to performing necessary duties in any particular case up to the licensee; to delete the requirement that the holder of a Third Class Radiotelegraph Operator Permit repeat the Morse code tests when applying for a Second Class Radiotelegraph Operator License after one year has lapsed since there is no significant public

---

[10] See Radio Regulations of the ITU, Article 23, Section 11A, paragraphs 866D, 866E (redesignated Article 44, Section II, paragraphs 3407 through 3410 and Article 55, Section II, paragraphs 3885 and 3886 by WARC, 1979 Geneva).

benefit from the requirement; to abolish the Aircraft Radiotelegraph Endorsement since we are not aware of any stations still in operation which would require the endorsement; and to make minor editorial changes in Part 13 of the rules to improve its readability and accuracy.

26. Only a few of the comments filed addressed the lifetime General Radiotelephone Operator License proposal. NARTE opposed the lifetime license proposal on the basis that it would not create any incentive to pursue continuing education in order to advance in technical skills and knowledge toward higher certifications and would eliminate any inducement to remain current with the Commission's rules and regulations. It suggested that the Commission impose renewal fees to offset the costs of the enforcement and record updating functions of the renewal process. NARTE further stated that if the Commission should decide to delegate licensing activity to non-governmental entities, such action would eliminate the Commission's concerns about costs associated with processing license renewals, and that the costs would be borne jointly by private entities and renewal applicants. MSP opposed lifetime license renewals because it believed that the licensed operator files would become obsolete, and it would be difficult to trace or locate a licensed technician who had performed unreliable servicing of equipment.

27. Mr. Raphel Soifer, New York, New York, filed the petition to amend Part 13 of the Rules to extend the terms of all commercial radio operator licenses to encompass the lifetime of the holder that resulted in RM-2643. Mr. Soifer, in comments filed in this proceeding, suggested that the Commission may wish to consider allowing Radiotelephone First and Second Class Operator Licenses which are valid and outstanding on the effective date of this Report and Order to remain valid for the lifetime of the holder, and to be considered as General Radiotelephone licenses. He stated that this would obviate the need for holders of such licenses to submit them for renewal in order to receive General Radiotelephone licenses and that this further simplification of requirements would reduce costs and paperwork for both the Commission and licensees. Mr. William D. Harris, Greensboro, North Carolina supported the proposal with the stipulation that the previously issued Radiotelephone First Class commercial licenses still valid be renewable for life because of the professional pride of commercial operators in having obtained the higher license.

28. Regarding the proposed extension of the renewal grace period for commercial radio operators from one year to five years, MSP opposed this proposal on the basis that it appeared to be extending the possibility of operation without a license for a longer period of time, especially for those who depend on the license for their livelihood. MPS suggested a review and revision of the waiver processing provision instead to eliminate restrictive and time

consuming requirements. No substantial comments were received concerning the other proposals regarding operator license procedures.

## IV. *DISCUSSION*

29. We will initially consider the proposals and comments concerning our operator licensing procedures, then address the proposals regarding requirements for licensed operators in the various services.

30. Concerning the proposed issuance of General Radiotelephone Operator Licenses for a lifetime term, we find that benefits derived from the current five-year renewal process in terms of enforcement and record updating functions are outweighed by the substantial costs of the present procedures in terms of staff resources required in processing renewal applications for this license. Adoption of the proposal will benefit the public interest by reducing agency expenses and allowing a more efficient allocation of resources, as well as relieving operators of the slight burden of applying for license renewal every five years. For enforcement purposes, the Commission has adequate sanction authority against operators available in terms of monetary forfeitures and operator license suspension for violation of Commission rules or the Act.[11] Thus, the practical loss of the ability to issue short-term operator license renewals for General Radiotelephone Operator infractions is of minimal effect. Additionally, we do not believe that the requirement for operator license renewal acts as an incentive to pursue continuing education. We have not, for a considerable period of time, required examinations for operator license renewal. Moreover, we believe that such incentive depends more on the circumstances and attributes of individual operators. Since we abolished the Radiotelephone First Class Operator License and renamed the second class license as a General Radiotelephone Operator License in Docket 20817, there has been no higher Commission-administered radiotelephone operator examination and license. We also reject the imposition of fees on the public in order to continue the renewal process for this license. We believe that, in this instance, it is more in the public interest to reduce our administrative costs in this manner than to impose an additional burden on the public. Irrespective of the action we are taking concerning rule requirements in various services, we note that the General Radiotelephone license is being retained due to requirements in services other than those addressed by our proposals. Therefore, our concerns about the costs of renewal processing are not totally eliminated by other actions taken in this Docket. Additionally, we note that Commission records that are used as a data-base for enforcement or other purposes concerning licensed

---

[11] See 47 U.S.C. 503(b) and 47 U.S.C. 303(m).

commercial operators do not reflect or update addresses. The application forms that do reflect addresses at the time of application are currently maintained for eight years and then destroyed. When lifetime licensing is instituted, the applications will be permanently maintained in government archives, but the Commission's file database will still not reflect current address information.

31. Regarding lifetime renewals of previously issued Radiotelephone First or Second Class licenses, the formal abolishment and name change for those licenses and the subsequent requirement that they be renewed as General Radiotelephone Operator Licenses prevents us from inequitably designating as lifetime licenses the remaining ones that have not yet been renewed as General Radiotelephone Operator Licenses.

32. Since we will be issuing General Radiotelephone Operator Licenses for lifetime terms, we eventually plan to discontinue new issuances of that license in the present diploma-type form (FCC 758-E) and to issue it only in a card-type form. In order to provide the existing General Radiotelephone and Radiotelephone First and Second Class Operator License holders with an opportunity to obtain a diploma-type lifetime General Radiotelephone Operator License Certificate, we plan a one-time issuance of such certificates for a period of one-year. The mechanics of implementing the issuance of new lifetime General Radiotelephone Operator Licenses and the special lifetime certificate are presently under study, and we will announce further details concerning this matter in a public notice to be issued in the near future.[12] The public notice will also provide further details concerning procedures to be followed where the license is to be used internationally and a photograph is required to ensure positive operator identification in foreign parts.

33. Concerning extension of the renewal grace period to five years, we note that the primary effect is to allow licensed operators with expired licenses to obtain renewals in that five year period without examination. Any operation or maintenance with an expired license would continue to be considered unlicensed as in the past, but the extended renewal grace period would benefit, for example, operators who left the industry and then returned and wanted to renew their licenses without an examination within that five year period. We believe that the proposal is in the public interest and that substantial benefits would be gained by eliminating the necessity for filing waiver requests.

34. We are adopting the proposed rule and procedural changes as set forth in the *Notice* concerning commercial radio operator licensing. We are also amending Rule Section 87.137 to delete a reference to the Aircraft Radiotelegraph Endorsement and Rule

---

[12] See paragraph 45 below regarding a restrictive endorsement that will appear on the new lifetime card-type general licenses.

Section 13.70 to clarify that duplication of commercial radio operator license documents is prohibited only in instances of use for fraudulent purposes.

35. We now consider the *Notice* and the comments received regarding proposed changes in the requirements for licensed commercial operators in various services.

36. Concerning general opposition to our proposals to eliminate the requirement of the General Radiotelephone Operator License in the various services specified in the *Notice*, we believe that each radio service should be examined separately, as we have done and are doing here, to determine whether such proposals would best serve the public interest. Regarding retention of the licensing requirement as a means of ensuring a certain level of technical competence, we note that many commenters in this Docket, as in Docket 20817, remarked upon the irrelevance of the licensing examination to the present state of technology as well as the practical realities of servicing equipment, and even suggested a strong need to revise and update the license examination to more accurately reflect a measure of technical competence. We further note that the survey conducted by NABER of land mobile radio dealers, discussed in paragraph 18 above, reflected that 61.4% of those responding did not believe that the current Commission test for the operator's license accurately reflected the technology necessary for the repair of two-way radio. In order to make the Commission's test relevant to constant technological changes that occur, we would need to update the test periodically, such as every year. The Commission, however, does not have the resources to periodically update the test and to incorporate new technological developments in the examination. Thus, our tests will continue to be of dubious value. On the other hand, licensees who deal with technicians directly, and who are responsible for and have an economic interest in maintaining the proper operation of their systems, are in a better position than the Commission to ascertain the qualifications of technical personnel. Accordingly, licensees should be permitted to determine whether an individual is technically competent to operate, install, or service their systems. Additionally, we see no reason to delay action in this proceeding pending completion of Docket 83–114 concerning the re-examination of technical standards. That is a longer term proceeding that will examine our technical rules and standards in a number of services, and there, as here, we are using a service-by-service approach.

37. With regard to comments received in opposition to the proposed changes in the broadcast services, we believe that the proposed modifications and deletions of requirements are in the public interest. Since our deletion of the requirement in Docket 20817 for a higher level of operator license at broadcast stations to repair transmitter equipment, there has been no identifiable signifi-

cant overall increase in interference problems in that service. In Docket 20817, we noted that the complete record in that proceeding did not demonstrate any significant correlation between operator licensing and signal quality interference control; that current available transmitting equipment had proven highly reliable; that marketplace forces and economic self-interest would better ensure that broadcasters employ competent operators and technicians than would a written examination; and that operator licensing imposes costs without concomitant benefits.[13] With particular regard to the broadcast service, nothing has occurred that changes our perception concerning those conclusions. Therefore, we conclude that it is inconsistent to retain the licensing requirements for these broadcast and auxiliary services and believe that the public interest is best served by adopting the proposals concerning the Broadcast Services as set forth in the *Notice*.

38. Regarding our proposals involving the Private Radio Services, it is initially noted that Congress recently enacted legislation that has a bearing on our consideration of the proposals. On December 8, 1983, the President signed H.R. 2755, the "Federal Communications Commission Authorization Act of 1983," Public Law 98–214. Section 10 of the legislation amended Section 4(f)(4) of the Communications Act of 1934, 47 U.S.C. §154(f)(4), to add a new subparagraph (E), which states as follows:

> The Commission shall have the authority to endorse certification of individuals to perform transmitter installation, operation, maintenance, and repair duties in the private land mobile services and fixed services (as defined by the Commission by rule) if such certification programs are conducted by organizations or committees which are representative of the users in those services and which consist of individuals who are not officers or employees of the Federal Government.

39. The above amendment is permissive, rather than mandatory, and to the extent it allows the Commission to endorse efforts by industry organizations or committees in the private land mobile services and fixed services to implement a comparable substitute to the Commission's present operator licensing program in those services, it is very broad and allows us a great deal of discretion.[14]

40. In view of this recent legislation and the overwhelming concern reflected in the comments received in this proceeding regarding potential interference and signal quality in the Private Land Mobile Radio and the Private Operational-Fixed Microwave Services, as well as the other concerns cited in the comments, we believe that this legislation enables us to develop an excellent

---

[13] See *Fourth Report and Order*, 87 FCC 2d 44 (1981) at p. 70.

[14] For the legislative history of Section 10, H.R. 2755, *see* 129 CONG. REC. S16863 (daily ed. Nov. 18, 1983) (remarks of Sen. Pressler) and 130 CONG. REC. E72 (1984) (remarks of Rep. Dingell).

compromise between our original proposals and the indicated desires of the private land mobile and private operational-fixed microwave communities. It allows us to endorse industry efforts in that particular marketplace to address in a responsive manner, through self-regulation, the expressed concerns of that community of users and technicians. It further assists us in accomplishing our objectives by allowing the Commission to eliminate unnecessary government regulation and involvement. Moreover, a modern industry certification program can be far more current and effective as a standard for measurement of technical ability than the outdated written examination system administered by the Commission. We anticipate that it will provide considerably better service to the public and the marketplace community.

41. Therefore, we strongly endorse and encourage organizations or committees representative of users in the Private Land Mobile Radio and Private Operational-Fixed Microwave Services to establish a national industry certification program or programs for technicians.

42. We further believe that the development of and details concerning the establishment of such a program or programs are best handled by the private sector itself, and that the Commission's involvement should be limited to a vigorous overall endorsement of such a certification program or programs by the industry and to the rule modifications discussed below. Unlike Commission implementation of recent legislation involving the use of Amateur Radio Service volunteers for license examination purposes, the issuance of Commission licenses are not involved here. Moreover, we interpret the recent legislation as affording the Commission a substantial amount of flexibility, and if difficulties do arise as a result of the action we are taking, we can, if necessary, revisit this matter to determine whether a more structured Commission supervision of certification programs is necessary pursuant to the statute. The Field Operations Bureau will monitor and report back to the C ommission concerning any appreciable increase in interference experienced in the Private Radio Services. However, we see no need at present to project this agency into the organizational process in terms of establishing specific guidelines and standards or certifying particular programs. Rather, we believe that such matters should be left to the appropriate industry groups, and that they are best able to determine the specific needs and requirements of an effective technician certification program or programs, as well as appropriate standards for administration. It appears to us that concerns regarding possible anticompetitive or discrimination problems with private sector certification programs are not well founded. As we noted in the *Fourth Report and Order* in Docket 20817[15], trade organizations are

---

[15] See 87 FCC 2d 44, page 68.

free to devise voluntary standards that are not exclusionary, and we believe that a relevant, non-discriminatory examination that would simply provide a voluntary screening device can be formulated and implemented by the private sector. We disagree with APCO that only the Commission can appropriately perform the qualifying and licensing function regarding technicians and believe that an industry program, which may even be able to incorporate some type of "practical" or "hands-on" tests or criteria concerning the certification of technicians, is eminently preferable to the present method of Commission licensing in these services. We do, however, offer several observations and suggestions. The legislation requires "organizations or committees representative of users" in the private land mobile and fixed services. Therefore, our endorsement of such programs does not extend to the establishment of a certification program by a private commercial entity. Secondly, we suggest that in order to be truly effective, a certification program or programs should be national in scope rather than regional, statewide, or local. We also believe that it would be extremely beneficial and advisable for the several commenting parties who are organizations or groups of users or technicians and who have indicated an interest in an industry certification program, as well as the others who may now wish to participate, to collaborate and confer with each other in order to attempt the development of one or more national private sector programs and to ensure that the certification program or programs eventually established will reflect effective standards of technical competence. In the near future, we plan to issue a Public Notice advising users and technicians of those organizations or committees who have expressed to the Commission an interest in establishing a technical certification program. The Commission stands ready to provide whatever assistance it can to interested organizations or groups in terms of supplying background information on our past examinations and licensing procedures. We further recommend highly and request that provision be made to "grandfather" existing General Radiotelephone Operator License holders (and First and Second Class License holders) into any newly established industry certification program or programs.

43. As indicated in our *Notice*, the station licensees are ultimately responsible for the control and proper operation of their stations, and we believe that licensees should have the freedom to utilize whatever measures they deem appropriate to insure that their stations are operated, serviced, and maintained in accordance with our technical rules and type-acceptance standards. Nevertheless, we do wish to support the industry technician certification effort as strongly as possible, consistent with our philosophy regarding licensee responsibility. Therefore, we are adopting modifications of our original proposed changes to Rule Sections 90.433 (Private Land Mobile Radio Service) and 94.103 (Private Operational-Fixed Micro-

wave Service) to specify with greater emphasis the ultimate responsibility of the licensee or station owner for proper operation of the station and to endorse and express our belief that the installation, service, or maintenance of transmitting equipment should be performed by a qualified technician certified by organizations or committees representative of users in the private land mobile or fixed services pursuant to 47 U.S.C. 154(f)(4)(E).

44. We are also, by rule modifications, encouraging the use of certified technicians in the Personal Radio Services, because we believe that many of the same concerns apply in those services, particularly the General Mobile Radio Service, as are present in the private land mobile and fixed services. We further note that since the *Notice* in this matter was issued, the Part 95 Rules dealing with the General Mobile Radio Service were updated and codified. See *Report and Order in the matter of update and codification of the General Mobile Radio Service Rules*, FCC 83-332, 48 Fed. Reg. 35234 (August 3, 1983). Our rule changes concerning the General Mobile Radio Service have been modified and revised accordingly.

45. In order to provide industry groups and committees concerned with the technician certification effort sufficient time to establish a program or programs, we will not make the particular rule changes discussed in paragraphs 43 and 44 effective until 180 days after publication of this Report and Order in the Federal Register. Should a further extension of time be required, we will consider such requests at a later date. Additionally, we note that footnote six in our *Notice* referred to specifically endorsing *new* lifetime General Radiotelephone Operator Licenses to discourage broadcast personnel from applying for these licenses unless they are otherwise required to hold them. This endorsement will limit the validity of *all new* General Radiotelephone Operator Licenses to operation, maintenance and repair of stations in the Aviation, Maritime, and International Fixed Public Radiocommunications Services only. The restrictive endorsement will begin appearing on *new* licenses when the card-type form is issued.[16] The new card-type form with the restriction will *not* be issued until the rule modifications discussed in paragraphs 43 and 44 become effective. Moreover, the special lifetime General Radiotelephone Operator License Certificate to be issued for a one-year period to existing general and first and second class license holders and any renewals after issuance of the special lifetime certificate will *not* reflect this restrictive endorsement.

46. We applaud the initiative shown by those organizations concerned with the Private Land Mobile Radio and Private Operational-Fixed Microwave Services in seeking to establish their own certification program or programs and believe that this approach in

---

[16] See paragraph 32 above.

these unique services will best serve their communities of users and technicians, as well as the public interest.

47. Regarding the Cable Television Relay Service and the Domestic Public Fixed Services, we received no substantive comments specifically directed to and in opposition to our proposals. We believe that the nature of and circumstances present in those services differ markedly from the high-volumed shared frequency usage considerations found in the Private Radio Services and that the public interest is best served by adopting our proposed rule changes in those services and deleting the requirements concerning radio operators. Once again, we wish to stress that these changes are being made consistent with the Commission's policies and rules that it is the station licensees themselves who are ultimately responsible for the control and operation of their stations.

## V. *CONCLUSIONS*

48. In view of the above discussion, we are adopting the proposals concerning modification or deletion of the requirement for licensed operators from our rules as set out in our *Notice*, with the exception of the proposals concerning the Private Land Mobile Radio Services, Private Operational-Fixed Microwave Service, and the Personal Radio Services. Regarding those services, we are modifying our proposed rule changes to emphasize that the installation, and/or service, and maintenance of transmitters should be performed by qualified technicians certified by organizations or committees representative of users in the private land mobile and fixed services. We are further adopting our proposed rule and procedural changes as set forth in the *Notice* concerning commercial radio operator licensing. The Commission strongly endorses and encourages organizations or committees representative of users in the Private Land Mobile Radio and Private Operational-Fixed Microwave Services to establish a national industry certification program or programs for technicians. We are further planning to issue a special one-time diploma-type lifetime General Radiotelephone Operator License Certificate to existing General Radiotelephone and Radiotelephone First and Second Class Operator License holders.

## VI. *REGULATORY FLEXIBILITY ACT—FINAL ANALYSIS*

49. *Need for rules and objectives*. The Commission has concluded that the modification or elimination of Commission rules that require licensed commercial radio operators in the Experimental Broadcast, International Broadcast, Auxiliary Broadcast, Private Land Mobile, Fixed, Personal, Domestic Public Fixed, and Cable Television Relay Services, and the modification of certain commercial radio operator licensing procedures to reduce the administrative burden on Commission resources are in the public interest. Our objectives are to create, to the maximum extent possible, an

unregulated, competitive, marketplace environment for the development of telecommunications, and to eliminate unnecessary regulations and policies.

50. *Issues raised by the public in response to the initial analysis.* We have taken into account the various issues raised by the public concerning the proposed rules. As a result of these comments and recent legislation, we have modified, consistent with our objectives, some of the original proposals.

51. *Alternatives that would lessen impact.* Commission adoption of modified rule changes regarding the Private Radio Services and support of private sector technician certification programs for those services lessens the impact of this action on small publishers producing examination study guides and on small business two-way radio users since the private sector certification program or programs will replace present Commission commercial radio operator requirements. We believe that we have diminished the impact to the maximum extent possible consistent with achieving the public interest objectives mentioned above. We will continue to examine alternatives in the future with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities.

## VII. *ORDERING CLAUSES*

52. Authority for these amendments appears in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and 303(r), and Section 553 of the Administrative Procedures Act, 5 U.S.C. §553.

53. Accordingly, IT IS ORDERED, That Parts 13, 21, 73, 74, 78, and 87 of the Commission's Rules (47 CFR Parts 13, 21, 73, 74, 78, and 87) are amended as shown in the Appendix attached thereto, effective thirty (30) days after publication of this Report and Order in the Federal Register. IT IS FURTHER ORDERED, That Parts 90, 94, and 95 of the Commission's Rules (47 CFR Parts 90, 94, and 95) are amended as shown in the Appendix attached hereto, effective one-hundred eighty (180) days after publication of this Report and Order in the Federal Register.

54. IT IS FURTHER ORDERED, That, this proceeding is terminated.

Federal Communications Commission
William J. Tricarico, *Secretary*

## APPENDIX

A. Part 13 of Title 47 of the Code of Federal Regulations, Commercial Radio Operators, is amended as follows:

1. Section 13.1 is revised to read as follows, and the two Notes following it are removed:

§13.1 Basis and purpose.

(a) *Basis*. The basis for the rules contained in this part is the Communications Act of 1934, as amended, and applicable treaties and agreements to which the United States is a party.

(b) *Purpose*. The purpose of the rules in this part is to prescribe the manner and conditions under which commercial radio operators are licensed by the Commission.

2. Section 13.2 is revised to read as follows:

§13.2 Classification of operator licenses and endorsements.

(a) Commercial radio operator licenses issued by the Commission are classified in accordance with the Radio Regulations of the International Telecommunications Union.

(b) The following licenses are issued by the Commission. International classification, if different from the license name, is given in parenthesis.

(1) First Class Radiotelegraph Operator's Certificate.

(2) Second Class Radiotelegraph Operator's Certificate.

(3) Third Class Radiotelegraph Operator's Certificate (radiotelegraph operator's special certificate).

(4) General Radiotelephone Operator License (radiotelephone operator's general certificate).

(5) Marine Radio Operator Permit (radiotelephone operator's restricted certificate).

(6) Restricted Radiotelephone Operator Permit (radiotelephone operator's restricted certificate).

(c) The following license endorsements are affixed by the Commission, to provide special authorizations or restrictions. Applicable licenses are given in parenthesis.

(1) Ship Radar endorsement (First and Second Class Radiotelegraph Operator's Certificates, General Radiotelephone Operator License).

(2) Six Months Service endorsement (First and Second Class Radiotelegraph Operator's Certificates).

(3) Restrictive endorsements; relating to physical handicaps, English language or literacy waivers, or other matters (all licenses).

(d) The following former licenses and endorsements are no longer issued; however, those outstanding are valid until expiration. Upon renewal, holders of these former licenses may be issued one or more of the licenses listed in paragraph (a), in accordance with §13.28.

(1) Radiotelephone First Class Operator License—last issued December 1981.

(2) Radiotelephone Second Class Operator License—last issued December 1981.

(3) Radiotelephone Third Class Operator Permit—last issued October 1980.

(4) Broadcast endorsement—last issued February 1979.

3. In Section 13.3, paragraph (c) is revised to read as follows:

§13.3 Holding of more than one commercial radio operator license.

* * * * *

(c) Each person who is legally eligible for employment in the United States may, if necessary, simultaneously hold:

(1) one General Radiotelephone Operator License and one Restricted Radiotelephone Operator Permit; or,

(2) one Marine Radio Operator Permit and one Restricted Radiotelephone Operator Permit.

* * * * *

4. Section 13.4 is revised to read as follows:

§13.4 Term of licenses.

(a) Commercial radio operator licenses are normally valid for a term of five years from the date of issuance, except as provided in paragraph (b) of this section.

(b) General Radiotelephone Operator Licenses and Restricted Radiotelephone Operator Permits are normally valid for the lifetime of the holder. The term of all Restricted Radiotelephone Operator Permits issued prior to November 15, 1953, and valid on that date, were extended to encompass the lifetime of such operators.

5. In Section 13.5, paragraph (c)(2) and the note following is removed.

§13.5 Eligibility for new license.

* * * * *

(c) * * *

(1) * * *

(2) [removed]

* * * * *

6. Section 13.12 is amended to read as follows:

§13.12 Additional requirements for First Class Radiotelegraph Operator's Certificate and Six Months Service Endorsement.

(a) First Class Radiotelegraph Operator's Certificate.

* * * * *

(b) * * *

(1) An endorsement may be placed on a First or Second Class Radiotelegraph Operator's Certificate attesting that the holder has had at least six months satisfactory service in the aggregate as a radio officer in a station on board a ship or ships of the United States.

(2) * * *

(ii) Under the authority of a First or Second Class Radiotelegraph Operator's Certificate prescribed and issued by the Federal Communications Commission; and

**(iii) While licensed as a radio officer by the U.S. Coast Guard in accordance with the Act of May 12, 1948 (46 U.S.C. 229 a-h).**

* * * * *

**7. Section 13.21 is amended by removing the text of paragraph (a)(7), and substituting therefor the word "reserved."**

**8. Section 13.22 is revised to read as follows:**

**§13.22 Required qualifications.**

**Commercial radio operator licenses are issued only to eligible applicants found qualified by the Commission, as follows:**

**(a) To be qualified to hold any commercial radio operator license, an applicant must have the ability to transmit correctly and receive correctly spoken messages in the English language.**

**(b) To qualify for a new commercial radio operator license other than the Restricted Radiotelephone Operator Permit, an applicant must demonstrate Morse code skill, if required, and a satisfactory knowledge of the material in one or more of the elements listed in §13.21, by passing all examinations required for the class of license to be issued:**

**(1) First Class Radiotelegraph Operator's Certificate.**

**(i) Transmitting and receiving Morse code tests 3 and 4.**

**(ii) Written examinations covering elements 1 and 2, 5 and 6.**

**(2) Second Class Radiotelegraph Operator's Certificate.**

**(i) Transmitting and receiving Morse Code tests 1 and 2.**

**(ii) Written examinations covering elements 1 and 2, 5 and 6.**

**(3) Third Class Radiotelegraph Operator's Certificate.**

**(i) Transmitting and receiving Morse code tests 1 and 2.**

**(ii) Written examinations covering elements 1 and 2, and 5.**

**(4) General Radiotelephone Operator License.**

**(i) Written examination covering element 3.**

**(5) Marine Radio Operator Permit.**

**(i) Written examination covering elements 1 and 2.**

**(c) No examination is required for the Restricted Radiotelephone Operator Permit. Instead, an applicant must certify that he or she:**

**(1) is legally eligible for employment in the United States; or, if not so eligible, holds an aircraft pilot certificate valid in the United States or an FCC radio station license in his or her name;**

**(2) can speak and hear;**

**(3) can keep, at least, a rough written log; and,**

**(4) is familiar with provisions of applicable treaties, laws, rules and regulations which govern the radio station he or she will operate.**

**9. Section 13.24 is revised to read as follows:**

§13.24 Passing score.

To pass a written examination, an applicant must answer at least 75 percent of the questions correctly.

10. Section 13.25 is amended by revising paragraph (a), as follows:

§13.25 Examination credit for licenses held.

(a) The holder of a valid commercial radio operator license (or a license which could be renewed under the provisions of §13.28) who applies for another class of commercial radio operator license will not be required to retake the written examinations or telegraphy tests which were required to obtain the license held.

* * * * *

11. Section 13.26 is amended by revising the heading and the chart as follows:

§13.26 Cancellation of superfluous licenses.

* * * * *

| *License Issued* | *License(s) Cancelled* |
|---|---|
| First Class Radiotelegraph Operator's Certificate | Second Class Radiotelegraph Operator's Certificate, Third Class Radiotelegraph Operator's Certificate, Radiotelephone Third Class Operator Permit, Marine Radio Operator Permit, Restricted Radiotelephone Operator Permit |
| Second Class Radiotelegraph Operator's Certificate | Third Class Radiotelegraph Operator's Certificate, Radiotelephone Third Class Operator Permit, Marine Radio Operator Permit, Restricted Radiotelephone Operator Permit |
| Third Class Radiotelegraph Operator's Certificate | Radiotelephone Third Class Operator Permit, Marine Radio Operator Permit, Restricted Radiotelephone Operator Permit. |
| General Radiotelephone Operator License | Radiotelephone First Class Operator License, Radiotelephone Second Class Operator License, Radiotelephone Third Class Operator Permit, Marine Radio Operator Permit. |
| Marine Radio Operator Permit | Radiotelephone Third Class Operator Permit. |

12. Section 13.27 is revised, and the note after it is removed:

§13.27 Re-examination waiting period.

An applicant who fails a written examination or code test required for a commercial radio operator license shall not apply for any class of license requiring that examination or test until 60 days after the date the examination or test was failed.

13. In Section 13.28, paragraph (a) is revised to read as follows:

§13.28 License Renewals.

(a) Commercial radio operator licenses issued for five year terms may be renewed, by proper application, at any time during the last year of the license term or during a five year grace period following expiration. Expired licenses are not valid during the grace period.

* * * * *

14. Section 13.61 is revised, and the four "Notes" currently associated with it are removed, as follows:

§13.61 Need for licensed commercial radio operators.

Rules which require Commission station licensees to employ licensed commercial radio operators to perform certain transmitter operating, maintenance, or repair duties are contained in Parts 73, 74, 81, 83 and 87 of this Chapter.

15. Section 13.70 is amended to read as follows:

§13.70 Fraudulent licenses.

No licensed radio operator or other person shall alter, duplicate for fraudulent purposes, or fraudulently obtain or attempt to obtain, or assist another to alter, duplicate for fraudulent purposes, or fraudulently obtain or attempt to obtain an operator license. Nor shall any person use a license issued to another or a license that he or she knows to be altered, duplicated for fraudulent purposes, or fraudulently obtained.

16. A new section 13.77 is added, as follows:

§13.77 Required endorsements.

(a) All Marine Radio Operator Permits shall bear the following endorsement:

> "This permit does not authorize the operation of AM, FM or TV broadcast stations."

(b) General Radiotelephone Operator Licenses issued to persons who first qualify for that classification of license (see §13.22) on or after shall bear the following endorsement:

> "This license is valid for operation, maintenance, and repair of stations in the Aviation, Maritime, and International Fixed Public Radiocommunications Services only."

B. Part 21 of Title 47 of the Code of Federal Regulations, Domestic Public Fixed Radio Service, is amended as follows:

1. Section 21.203 is removed.
2. Section 21.205 is removed.
3. Section 21.207 is amended by removing paragraph (e).
4. Section 21.208 is amended by revising paragraph (e)(1) and removing paragraphs (e)(2), (g), and (h) as follows:

§21.08 Station records.

* * * * *

(e) * * *

(1) The results and dates of the transmitter measurements required by §21.207.

(2) [removed]

* * * * *

(g) [removed]

(h) [removed]

C. Part 73 of Title 47 of the Code of Federal Regulations, Radio Broadcast Services, is amended as follows:

1. Section 73.764 is amended by revising paragraph (a), and removing the note following the section:

§73.764 International broadcast station operator requirements.

(a) One or more operators holding a commercial radio operator license (any class, unless otherwise endorsed) must be on duty where the transmitting apparatus of each station is located and in actual charge thereof whenever it is being operated.

* * * * *

2. Section 73.1515 is amended by revising paragraph (c)(6) and removing the note which follows paragraph (c)(6):

§73.1515 Special field test authorizations.

* * * * *

(c) ***

(6) Test transmitters must be operated by or under the immediate direction of an operator holding a commercial radio operator license (any class, unless otherwise endorsed).

* * * * *

3. In Section 73.1860, paragraph (a) is revised to read as follows:

§73.1860 Transmitter duty operators.

(a) Each AM, FM or TV broadcast station must have at least one person holding a commercial radio operator license (any class, unless otherwise endorsed) on duty in charge of the transmitter during all periods of broadcast operation. The operator must be on duty at the transmitter location, a remote control point, an ATS monitor and alarm point, or a position where extension meters are installed under the provisions of §73.1550.

* * * * *

4. In Section 73.1870, paragraph (a) is revised to read as follows:

§73.1870 Chief operators.

(a) The licensee of each AM, FM, or TV broadcast station must designate a person holding a commercial radio operator license (any class, unless otherwise endorsed) to serve as the station's chief operator. At times when the chief operator is unavailable or unable to act (e.g., vacations, sickness), the licensee shall designate another licensed operator as the acting chief operator on a temporary basis.

* * * * *

D. Part 74 of the Title 47 of the Code of Federal Regulations, Experimental, Auxiliary, and Special Broadcast, and Other Program Distributional Services, is amended as follows:

1. Section 74.18 is amended by revising paragraph (b), deleting the Note following paragraph (c) and adding new paragraphs (d) and (e) to read as follows:

§74.18 General operator requirements.

* * * * *

(b) Except as noted in paragraph (e) below, stations authorized under the provisions of this Part may be operated by any person designated by the station licensee.

(c) * * *

(d) Except as noted in paragraph (e) below, the installation, adjustment, and maintenance of any transmitter licensed under the provisions of this Part may be performed by any person deemed qualified to perform such duties by the licensee.

(e) Persons who perform any operating or transmitter technical duties licensed under Subparts A, B, C, G and L must hold a commercial radio operator license (any class, unless otherwise endorsed).

2. Section 74.166 is removed.
3. Section 74.266 is removed.
4. Section 74.366 is removed.
5. Section 74.468 is removed.
6. Section 74.565 is removed.
7. Section 74.665 is removed.
8. Section 74.750 is amended by revising paragraph (g) to read as follows:

§74.750 Transmission system facilities.

* * * * *

(g) Low power TV or TV translator stations installing new type accepted transmitting apparatus incorporating modulating equipment need not make equipment performance measurements and shall so indicate on the station license application. Stations adding new or replacing modulating equipment to existing low power TV or TV translator transmitting apparatus must have a qualified operator (§74.18) examine the transmitting system after installation. This operator must certify in the application for the station license that the transmitting equipment meets the requirement of paragraph (d)(1) of this section. A report of the methods, measurements, and results must be kept in the station records. However, stations installing modulating equipment solely for the limited local origination of signals permitted by §74.731 need not comply with the requirements of this paragraph.

9. Section 74.766 is removed.
10. Section 74.868 is removed.
11. Section 74.966 is removed.
12. Section 74.1266 is removed.

E. Part 78 of Title 47 of the Code of Federal Regulations, Cable Television Relay Services is amended as follows:

1. Section 78.51 is revised as follows:

§78.51 Remote control operation.

* * * * *

(a)(2) An operator shall be on duty at the remote control position and in actual charge thereof at all times when the station is in operation.

* * * * *

2. Section 78.53 is revised as follows:

§78.53 Unattended operation.

* * * * *

(a)(4) Personnel responsible for the maintenance of the station shall be available on call at a location which will assure expeditious performance of such technical servicing and maintenance as may be necessary whenever the station is operating. In lieu thereof, arrangements may be made to have a person or persons available at all times when the transmitter is operating, to turn the transmitter off in the event that it is operating improperly. The transmitter may not be restored to operation until the malfunction has been corrected by a technically qualified person.

(5) The station licensee shall be responsible for the proper operation of the station at all times and is expected to provide for observations, servicing and maintenance as often as may be necessary to ensure proper operation. All adjustments or tests during or coincident with the installation, servicing, or maintenance of the station which may affect its operation shall be performed by or under the immediate supervision of a technically qualified person.

* * * * *

3. Section 78.59 is revised as follows:

§78.59 Posting of station license.

* * * * *

(d) [deleted]

4. Section 78.61 is revised as follows:

§78.61 Operator requirements.

(a) Except in cases where a CARS station is operated unattended in accordance with §78.53 or except as provided in other paragraphs of this section, a person shall be on duty at the place where the transmitting apparatus is located, in plain view and in actual charge of its operation or at a remote control point established pursuant to the provision of §78.51, at all times when the station is in operation. Control and monitoring equipment at a remote control point shall be readily accessible and clearly visible to the operator at that position.

(b) [deleted]

(c) Any transmitter tests, adjustments, or repairs during or coincident with the installation, servicing, operation or maintenance of a CARS station which may affect the proper operation of such station shall be made by or under the immediate supervision and responsibility of a person responsible for proper functioning of the station equipment.

(d) The operator on duty and in charge of a CARS station may, at the discretion of the licensee, be employed for other duties or for the operation of another station or stations in accordance with the rules governing such stations. However, such duties shall in no way impair or impede the required supervision of the CARS station.

* * * * *

(f) Mobile CARS stations operating with nominal transmitter power in excess of 250 milliwatts may be operated by any person whom the licensee shall designate: Provided that a person is on duty at a receiving end of the circuit to supervise operation and to immediately institute measures sufficient to assure prompt correction of any condition of improper operation that may be observed.

5. Section 78.69 is revised as follows:

§78.69 Station records.

* * * * *

(d)(2) [deleted]

6. In Section 78.107 is revised as follows:

§78.107 Equipment and installation.

* * * * *

(d) The installation of a CARS station shall be made by or under the immediate supervision of a qualified engineer. Any tests or adjustments requiring the radiation of signals and which could result in improper operation shall be conducted by or under the immediate supervision of a person with required knowledge and skill to perform such tasks.

* * * * *

F. Part 87 of Title 47 of the Code of Federal Regulations, Aviation Services, is amended as follows:

§87.137 Radio stations using radiotelegraphy.

(a) Except as provided in §87.135, an aircraft radio station, when transmitting radiotelegraphy by any type of the Morse Code shall be operated by a person holding a radiotelegraph first- or second-class operator license.

(b) Except as provided in §§87.135 and 87.139, a station other than an aircraft station, when transmitting by any type of the Morse Code for purposes other than automatically keyed station identification, shall be operated by a person holding any class of radiotelegraph license or permit.

G. Part 90 of Title 47 of the Code of Federal Regulations, Private Land Mobile Radio Services, is amended, as follows:

1. Section 90.433 is amended to read as follows:

§90.433 Operator requirements.

(a) No operator license or permit is required for the operation, maintenance, or repair of stations licensed under this part.

(b) Any person, with the consent or authorization of the licensee, may employ stations in this service for the purpose of telecommunications.

(c) The station licensee shall be responsible for the proper operation of the station at all times and is expected to provide observations, servicing and maintenance as often as may be necessary to ensure proper operation. All adjustments or tests during or coincident with the installation, servicing, or maintenance of the station should be performed by or under the immediate supervision and responsibility of a person certified as technically qualified to perform transmitter installation, operation, maintenance, and repair duties in the private land mobile services and fixed services by an organization or committee representative of users in those services.

(d) The provisions of paragraph (b) of this section shall not be construed to change or diminish in any respect the responsibility of station licensees to have and to maintain control over the stations licensed to them (including all transmitter units thereof), or for the proper functioning and operation of those stations (including all transmitter units thereof), in accordance with the terms of the licenses of those stations.

**2. Section 90.435 is removed and reserved as follows:**

**§90.435 [Reserved]**

**H. Part 94 of Title 47 of the Code of Federal Regulations, Private Operational-Fixed Microwave Service, is amended as follows:**

**1. Section 94.103 is amended to revise Subsection (a), (c) and (d) and to delete (e) as follows:**

**§94.103 Operator requirements.**

**(a) No operator license is required for the operation, maintenance, or repair of stations licensed under this part.**

* * * * *

**(c) The station licensee shall be responsible for the proper operation of the station at all times and is expected to provide for observations, servicing and maintenance as often as may be necessary to ensure proper operation. All adjustments or tests during or coincident with the installation, servicing, or maintenance of the station should be performed by or under the immediate supervision and responsibility of a person certified as technically qualified to perform transmitter installation, operation, maintenance, and repair duties in the private land mobile services and fixed services by an organization or committee representative of users in those services.**

**(d) The provisions of paragraph (b) of this section authorizing unlicensed persons to operate stations shall not be construed to change or diminish in any respect the responsibility of station licensees to have and to maintain control over the stations licensed to them (including all transmitter units thereof), or for the proper functioning and operation of those stations (including all transmitter units thereof) in accordance with the terms of the licenses of those stations.**

**(e) [delete]**

**I. Part 95 of Chapter I of Title 47 of the Code of Federal Regulations is revised as follows:**

**1. In Subpart A - General Mobile Radio Service, Sections 95.129, 131 and 133 are amended to read as follows:**

**§95.129 Station equipment.**

* * * *

**(b)(3) Has been internally adjusted or repaired by anyone except a person authorized under §95.131.**

* * * *

**§95.131 Service station transmitters.**

**(a) The station licensee shall be responsible for the proper operation of the station at all times and is expected to provide for observations, servicing and maintenance as often as may be necessary to ensure proper operation. All adjustments or tests during or coincident with the installation, servicing, or maintenance of the station should be performed by or under the immediate supervision and responsibility of a person certified as technically qualified to perform transmitter installation, operation, maintenance, and repair duties in the private land mobile services and fixed services by an organization or committee representative of users in those services.**

* * * * *

§95.133 Modification to station transmitters.

* * * * *

(b) * * *

(1) By the original manufacturer of the transmitter.

(2) In accordance with the original manufacturer's instructions by a person authorized under §95.131.

2. In Subpart C—Radio Control (R/C) Radio Service, Paragraph (b) of Section 95.221 (R/C Rule 21) is amended to read as follows:

§95.221 (R/C Rule 21) How do I have my R/C transmitter serviced?

* * * * *

(b) You are responsible for the proper operation of the station at all times and are expected to provide for observations, servicing and maintenance as often as may be necessary to ensure proper operation. Each internal repair and each internal adjustment to an FCC type accepted R/C transmitter (see R/C Rule 9) must be made in accord with the Technical Regulations (see Subpart E). The internal repairs or internal adjustments should be performed by or under the immediate supervision and responsibility of a person certified as technically qualified to perform transmitter maintenance and repair duties in the private land mobile services and fixed services by an organization or committee representative of users in those services.

* * * * *

3. In Subpart D—Citizens Band (CB) Radio Service, Paragraph (b) of Section 95.424 (CB Rule 24) is revised to read as follows:

§95.424 (CB Rule 24) How do I have my (CB) station transmitter serviced?

* * * * *

(b) You are responsible for the proper operation of the station at all times and are expected to provide for observations, servicing and maintenance as often as may be necessary to ensure proper operation. You must have all internal repairs or internal adjustments to your CB transmitter made in accordance with the Technical Regulations (see Subpart E). The internal repairs or internal adjustments should be performed by or under the immediate supervision and responsibility of a person certified as technically qualified to perform transmitter maintenance and repair duties in the private land mobile services and fixed services by an organization or committee representative of users in those services.

4. In Subpart E—Technical Regulations, Paragraph (c) of Section 95.621, and Subparagraph(e)(2) of Section 95.645 are amended to read as follows:

§95.621 Compliance with technical requirements.

* * * * *

(c) In each case, the report which is submitted must describe the results of the tests and adjustments and the test equipment and procedures used. A copy of this report must also be kept in the station records.

* * * * *

§95.645 Additional requirements for type acceptance.

* * * * *

(e) * * *

(1) * * *

(2) Warnings concerning any adjustments which could result in improper technical performance.

* * * * *

## Concurring Statement of FCC Commissioner James H. Quello

In re: Report and Order, General Docket 83–322; Requirements for Licensed Operators in Various Radio Services

I believe that the Commission has a legitimate role in the licensing of technicians for the various services it regulates. Insofar as licensing ensures a certain minimum level of competence, it can reduce the need for the Commission to expend scarce resources tracking down trouble after it develops.

Although I am satisfied that an adequate licensing program can produce significant benefits, I do not believe the Commission has had an adequate licensing program for a number of years. We have been unwilling to devote sufficient resources to the preparation of tests and to ensure that they were geared to state of the art technology. We have been unwilling to update our tests with sufficient frequency to prevent wide distribution of test questions. We have been unwilling to re-test upon license renewal to determine continued competence.

In short, our licensing program has, over the years, degenerated into essentially a paper exercise without significant meaning in terms of screening for competence. Obviously, many of those who hold FCC licenses are highly competent and perform their functions with a high degree of knowledge and skill. The point is that their skill level and the FCC license they hold have very little to do with each other. Today's Commission action to eliminate the licensing program is, in my view, merely a public acknowledgment of that sad fact.

Therefore, I concur.

Application, Processing of
Hearing, Bifurcation of Proceedings
Hearing, Procedure
Initial Decision, Supplemental
Mitigating Evidence, Generally
Orders, Clarification of

Commission approved hearing procedures adopted by ALJ to use lead attorney, but bifurcates proceeding, directs ALJ to issue partial supplemental initial decision on renewal applicant's qualifications and elaborates on scope of admissible mitigating evidence. Commission also directed staff to begin processing competing applications pending in other proceedings involving same renewal applicant.
–*RKO General, Inc. (KHJ-TV)*
Docket 16679

FCC 84–26

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| RKO GENERAL, INC. (KHJ-TV)<br>Los Angeles, California | Docket No. 16679<br>File No. BRCT-58 |
| For Renewal of Broadcast License | |
| FIDELITY TELEVISION, INC.<br>Norwalk, California | Docket No. 16680<br>File No. BPCT-3655 |
| For Construction Permit for<br>New Television Broadcast Station | |

## MEMORANDUM OPINION AND ORDER

(Adopted: January 25, 1984; Released: January 25, 1984)

BY THE COMMISSION: Commissioner Patrick not participating.

1. Now before the Commission are a number of pleadings filed in response to two Commission Orders released July 15 and 19, 1983.[1] These pleadings seek reconsideration of the above two orders and challenge the procedures adopted by the Commission designed to expedite resolution of certain issues designated against RKO Gener-

---

[1] FCC 83–341, 54 RR 2d 717, released July 15, 1983 and FCC 83–342, released July 19, 1983.

al, Inc. (RKO) in our Order, FCC 83–274, 54 RR 2d 53, released June 8, 1983.

2. By way of background, in the June 8, 1983 Order, the Commission remanded the above captioned proceeding to an Administrative Law Judge for the purpose of inquiring into the impact of RKO's disqualification as the licensee of WNAC-TV, Boston, Massachusetts (Docket No. 18759)[2] on its qualifications to remain the licensee of KHJ-TV, Los Angeles. In the interest of saving time and avoiding relitigation of common issues, the Commission subsequently ordered that the applicants seeking to displace RKO as the licensee of its 13 other broadcast facilities[3] should be made parties to the instant proceeding for the "limited purpose of participating in the resolution of questions which are common to RKO's overall basic and comparative qualifications and which arose out of the Boston proceeding."[4] In its July 15, 1983 Order the Commission directed the

---

[2] *RKO General, Inc. (WNAC-TV)*, 78 FCC 2d 1 (1980). The Commission had found RKO unqualified as the licensee of WNAC-TV, Boston Massachusetts, KHJ-TV, Los Angeles, California (78 FCC 2d 355) and WOR-TV, New York, New York (78 FCC 2d 357) for its lack of candor in not reporting an investigation by the Securities and Exchange Commission (SEC) into the improper corporate practices of the General Tire & Rubber Company, the corporate parent of RKO, and for unequivocally denying charges raised by Community Broadcasting of Boston, Inc., a challenger in the Boston proceeding, when RKO knew or should have known that there was substantial truth to the allegations raised; for intentionally filing false and improper annual financial reports; and for engaging in illegal reciprocal trade practices. The Court agreed with the Commission's disposition of the WNAC-TV proceeding but on the limited ground that RKO had lacked candor in its dealings with the Commission. *RKO General, Inc.* v. *FCC*, 670 F.2d 215 (1981), *cert. denied*, 102 S.Ct. 1974, 2931 (1983). It then remanded the Los Angeles and New York proceedings for consideration of the impact of RKO's disqualification in Boston on that company's qualifications to remain the licensee of KHJ-TV and WOR-TV. The WOR-TV proceeding (Docket Nos. 1999–92) was subsequently terminated upon RKO's agreement to relocate its VHF channel in Secaucus, New Jersey. FCC 82–559, released March 29, 1983. An appeal filed by Multi-State Communications Corporation, the competing applicant in the New York proceeding, is now pending. Civil Case Nos. 83–1296 and 83–1325.

[3] These 13 broadcast facilities are: WHBQ-TV and WHBQ, Memphis, Tennessee; WOR and WRKS(FM), New York, New York; WRKO and WROR(FM), Boston, Massachusetts; KHJ and KRTH(FM), Los Angeles California; WGMS, Bethesda, Maryland; WGMS-FM, Washington, D.C.; KFRC, San Francisco, California; WAXY(FM), Ft. Lauderdale, Florida; and WFYR(FM), Chicago, Illinois. Renewal applications for these 13 broadcast stations, which had been granted subject to the outcome of the Boston, Los Angeles and New York television renewal proceedings, were designated for hearing, 82 FCC 2d 291 (1980). By decision, *New South Media Corporation* v. *FCC*, 685 F.2d 708 (D.C. Cir. 1982), the Court ordered the Commission to permit competing applications to be filed against these 13 RKO renewal applications. The Commission subsequently issued a Memorandum Opinion and Order, FCC 83–55, released February 11, 1983, setting May 12, 1983 as the cut-off date for the filing of competing applications. As of that date 171 competing applications were tendered for acceptance.

[4] FCC 83–341, para. 4.

parties to file notices of appearance and to devise a voluntary plan for representative counsel in lieu of a Commission imposed plan.[5] On August 26, 1983, pro tem RKO Hearing Representative Counsel reported that efforts to name representative counsel had reached an impasse.[6]

3. Now before the Commission are petitions for reconsideration filed by Fidelity Television, Inc. (Fidelity); River City Communications Corporation (River City); and Magna Media Corporation, Potomac Broadcasting Corporation, East Lake Communications, Inc. and Adwave Company (Magna Media), respectively. A fourth party has sought an extension of time to file a petition for reconsideration pending the outcome of questions on the procedural steps adopted by the Commission.[7] Comments have also been filed by National Capital Radio Corporation (NCRC),[8] challenging certain procedural steps adopted by this agency.

4. The common theme running through the respective pleadings is petitioners' disagreement with the Commission's determination to consolidate these proceedings and to use representative counsel as a means to expedite the KHJ-TV proceeding. Fidelity argues that the Commission's determination to name those applicants, who have filed a total of 171[9] competing applications, parties to the Los Angeles proceeding will unnecessarily prolong the Los Angeles proceeding and that no plan utilizing representative counsel can be fashioned to avoid this delay. River City contends that the Commission should commence immediately thirteen separate comparative proceedings subject to the outcome of the Los Angeles proceeding. Magna Media asserts that the Commission lacks authority to impose

---

[5] No Notices of Appearance have been received on behalf of 19 applicants filing 40 applications. These applicants are: Rita F. Hurwitz; Gary L. Portmess; Jane Clabough Grams: Stephen E. Powell; TNR Broadcasting Group; Donnie Simpson Enterprises, Inc.; Bryan Benware; Danna May-Lynn Duran; Michael G. Lacy; Douglas Reed Mathis; Horizon Communications, Inc.; Bethesda Broadcasting Corporation; Skywave Broadcasters, Inc.; W. Ronald Smith; Nash Communications Corp.; Los Angeles Metro Broadcasters; Lynda W. Foster; Sherrie Lynn Hauser; and S/G Communications. If the above listing is incorrect, the affected parties are invited to submit a certified copy of their respective notices of appearance filed within the prescribed August 9, 1983 deadline.

[6] This "Report to the Commission" followed an earlier "Interim Report and Request for Extension of Time, filed August 12, 1983, advising the Commission that on July 26, 1983 an unspecified number of parties, through counsel, had met for the purpose of selecting representative counsel and that five representatives had been tentatively chosen.

[7] Micon Media, Inc., applicant for WHBQ-TV, Memphis, Tennessee. Given the breadth of the questions raised and considered herein, we will deny Micon Media's request for an extension of time to file a further petition for reconsideration.

[8] National Capital Radio Corporation is an applicant competing for Station WGMS-FM, Washington, D.C.

[9] There are 171 applications now on file, not 172 as reflected in our Order, FCC 83-342, released July 19, 1983. The July 19, 1983 Order incorrectly included Freedom Broadcasting Corporation as an applicant for Station WRKS(FM), New York.

the use of representative counsel. NCRC contends that a plan for representative counsel must provide for the inclusion of independent counsel, thereby avoiding the ethical complication of requiring existing counsel to represent conflicting interests.

## *DISCUSSION*

5. With respect to questions stemming from the Commission's plan to use representative counsel, procedures adopted by the Administrative Law Judge under his inherent powers, and the actions of the parties themselves, have dispelled many of the concerns expressed by the respective petitioners in their pleadings. For instance, by Order, FCC 83M-2977, released August 31, 1983, the ALJ adopted several specific steps aimed at expediting this proceeding and avoiding duplicative hearing efforts. First, he gave all potential participants a September 15, 1983 deadline to file a statement of intention to participate in a scheduled September 23, 1983 prehearing conference, with the caveat that counsel for more than one party should file on behalf of all parties represented, and that a spokesman should be specified from each firm. Second, he notified all parties that petitions to enlarge the issues should be filed by September 23, 1983, that filings duplicating Fidelity's pleadings or inconsistent with the Commission's remand order will be disregarded, that joint requests should be filed whenever possible, and that counsel should file a single request on behalf of all parties represented. Third, he ruled that all discovery efforts should be undertaken jointly. Finally, he stated his intention to adopt post discovery procedures which will eliminate cumulative efforts by counsel.

6. Following the September 23, 1983 prehearing conference, the ALJ reported that only two counsel, Morton Berfield and Joseph Hennessey, had stated an intent to participate in the KHJ-TV proceeding and that they would coordinate their efforts with Fidelity "to insure that repetitious questions and pleadings are not filed."[10] The ALJ then provided that counsel who might nonetheless wish to participate would be required to coordinate their efforts with other counsel, to file coordinated, non-repetitious written objections and rebuttals, and to file coordinated, non-repetitive proposed findings and conclusions and replies.[11]

7. The above steps provide assurance that this proceeding will be conducted in compliance with the Commission's objectives of expedition and efficiency. In light of the ALJ's actions and the analysis set forth above, it therefore appears unnecessary for the Commission to

---

[10] *Order*, FCC 83M-3385.

[11] *See also* FCC 83M-3090, released September 8, 1983, in which the ALJ required each law firm, wishing to participate in the KHJ-TV proceeding, to file a single statement on behalf of all clients represented.

take any additional steps along these lines. We nonetheless invite the ALJ's and parties' attention to the *Manual for Complex Litigation* for further guidance.[12] This *Manual*, which is particularly relevant to cases involving many parties and a multitude of complex questions of law and fact, makes many salient recommendations. For instance, it suggests that in complex litigation participation should be through lead counsel.[13] The manner in which the ALJ has organized this proceeding suggests that Eugene F. Mullin, who represents Fidelity, and Morton Berfield and Joseph Hennessey, who represent a number of other applicants, will in fact serve as lead counsel. The *Manual* also indicates that counsel for other parties should retain the right "to examine a witness, conduct further examination of a witness, or present further contentions but without repetition,"[14] although this right is not without limitation. Again the ALJ has acted in accordance with this recommendation by ordering coordinated efforts with other counsel. With respect to discovery, the ALJ has the option to prohibit "nonlead" counsel from initiating either further discovery proceedings or pretrial motions without first securing approval of lead counsel. If nonlead counsel disagree with a decision of lead counsel, they can apply to the ALJ for an order authorizing them to file their proposed motions or initiate their proposed discovery proceedings.[15] Similarly, the *Manual* recommends use of lead counsel during the hearing stage of the proceeding,[16] with a right of counsel for other parties to examine a witness, to conduct further examination of a witness, or to present further contentions only "without repetition."[17] In sum, the ALJ has the inherent authority to "regulate the course of the hearing"[18] and has imposed restrictions and taken specific steps to eliminate duplication and repetition in accordance with this inherent authority. These actions will not be deemed susceptible to challenge "because of misapplied notions concerning interference with a party's right to his own counsel."[19] In light of the above, we commend the ALJ and the parties for the cooperativeness thus far displayed, and direct that they fully adhere to the procedures already adopted, as well as those that are hereinafter imposed, as the best means to assure a complete and speedy resolution of this stage of the proceeding.[20]

---

[12] *Manual for Complex Litigation*, (5th Ed. 1982). These procedures are recommended "because, as the product of experience and the development of able minds, they are deemed worthy of consideration by all." *Manual*, p. vi, from the "Foreward" by Chief Judge Alfred P. Murrah to the *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351 (1960). It "is designed to stimulate the devising of procedures appropriate in solving new problems as they arise. It is intended to be a living document into which desirable techniques proved by experience will be incorporated in the future. Rarely does complex litigation follow a set pattern. Accordingly, flexibility should be the keynote in applying the suggestions contained in the *Manual*." *Id.* vi-vii.

[13] *Manual*, § 1.92.

[14] *Manual*, at § 1.92, p.91.

[15] *See Vincent* v. *Hughes Air West, Inc.*, 557 F.2d 759, 764 (9th Cir. 1977). *See also Abrams* v. *Occidental Petroleum Corp.*, 44 F.R.D. 543 (S.D.N.Y. 1968).

[16] See *Manual*, Part 1, § 4.53.

[17] *Manual*, at 157.

[18] Section 1.243(f) of the Commission's Rules.

8. We turn next to the question of whether the Commission's determination to proceed in a consolidated proceeding should be modified. Under Section 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §154(j), and Section 1.1 of the Commission's Rules, this agency is vested with broad power to adopt such procedures as "will best conduce to the proper dispatch of business and to the ends of justice." The Courts have repeatedly deferred to the Commission's authority to so fashion its procedures,[21] and in

---

[19] *McAllister* v. *Guterma*, 263 F.2d 65, 69 (2d Cir. 1958).

[20] The *Manual* also proposes that in complex cases with many parties, the ALJ should consider requesting counsel for the parties to select one or more liaison counsel. Section 1.90. The duties of liaison counsel are largely ministerial and are designed to facilitiate communication between the ALJ and counsel and to secure responses from counsel on procedural questions. According to the *Manual*, the functions of liasion counsel should include the following:

> (a) receive on behalf of and promptly distribute to the parties for whom he acts, notices and other documents from the court or from other parties; (b) act as spokesman at pretrial conferences for the group he represents; and (c) call meetings of counsel to propose joint actions. These meetings may be held to agree upon responses to questions and suggestions of the court; to initiate proposals, suggestions, proposed orders, proposed schedules, joint brief, and joint schedules; and to initiate or oppose other pretrial proceedings when appropriate. When expressly authorized by court order, liaison counsel may exercise other functions and powers as defined in the court order. *Id.*

[21] *See e.g., Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138, 143 (1940); *FCC* v. *Schreiber*, 381 U.S. 279 (1965); *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 276, 282 (1949). *See also Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519, 524–525 (1978). In *Schreiber* at 289, the Court elucidated:

> Section 4(j) of the Communications Act of 1934, as amended, 48 Stat. 1068, 47 U.S.C. §154(j) (1958 ed.), empowers the Federal Communications Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." This Court has interpreted that provision as "explicitly and by implication" delegating to the Commission power to resolve "subordinate questions of procedure . . . [such as] the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions." *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 138. The statute does not merely confer power to promulgate rules generally applicable to all Commission proceedings, cf. *Federal Communications Comm'n* v. *WJR*, 337 U.S. 265, 282; it also delegates broad discretion to prescribe rules for specific investigations, cf. *Norwegian Nitrogen Co.* v. *United Co., supra.* Congress has "left largely to its judgment the

different phases of this proceeding have so stated.[22]

9. Here the questions common to all proceedings involving RKO are whether RKO is qualified to remain a broadcast licensee and, if so, whether there is any impact upon its comparative qualifications stemming from the Boston proceeding. These questions will have to be answered whether in the context of a single proceeding or in fourteen separate proceedings. In the interest of the greatest efficiency and to avoid possible conflicting results, we have elected to pursue these questions in the context of a single, consolidated proceeding. However, in light of questions raised by the parties and Orders issued by the presiding Administrative Law Judge, the Commission feels compelled to elaborate on procedures thus far adopted. We turn first to the KHJ-TV proceeding.

10. At paragraph 15 of our June 8, 1983 Order, we directed the ALJ and the parties to focus exclusively on questions arising out of the Boston proceeding which concerned RKO's basic and comparative qualifications. Upon completion of this phase of the proceeding the ALJ was to prepare a Supplemental Initial Decision covering such matters. We repeated our intent to follow this procedure in paragraph 15 of our July 15, 1983 Order, again emphasizing that our present concern dealt only with RKO's qualifications and deferring consideration of petitions to enlarge issues against any other party to a later time. By *Memorandum Opinion and Order*, FCC 83M-3059, released September 7, 1983, the ALJ adopted a procedure which contemplates a hearing on all issues concerning RKO and Fidelity and a full comparative evaluation of both applications before a decision is to be rendered. As noted, this is inconsistent with the Commission's intention. It is therefore necessary that we clarify the procedure to be followed. Foremost, we direct that a two-phase proceeding be utilized, with each phase to be concluded by issuance of a partial Supplemental Initial Decision. The first phase is to address only the issues arising out of the Boston proceeding bearing on RKO's basic and comparative qualifications (plus the mitigation showing discussed in paragraph 11, *infra*), with any appeals thereto being filed directly with the Commission. After the time for filing appeals has elapsed, the ALJ and parties are then to commence the second phase of the hearing, *i.e.*, consideration of matters involving Fidelity's qualifications and the choice to be made between the

---

determination of the manner of conducting its business which would most fairly and reasonably accommodate" the proper dispatch of its business and the ends of justice. *Federal Communications Commission* v. *WJR*, *supra*. (Footnote omitted).

[22] In directing the Commission to accept competing applications, *New South Media Corp.* v. *FCC*, 685 F.2d 708, 710 (D.C. Cir. 1982), the Court explicity stated that it was not "purporting to direct the particular mode in which the Commission should now proceed," thereby leaving it to the agency to prescribe the format of such further proceedings. *Id.* at 718. *See also RKO General, Inc.* v. *FCC*, *supra*, 670 F.2d at 237 n.48, where the Court left the manner of proceeding with the adduction of mitigating evidence to the Commission.

applicants for this channel, assuming that more than one applicant is found qualified. However, no Supplemental Initial Decision concerning Phase two matters is to be issued until such time as the Commission has had an opportunity to review the Phase one decision and the results of such review have been made public. The ALJ is accordingly directed to conform his procedures to the Commission's directives in order to develop a comprehensive, uncluttered record on RKO's basic and comparative qualifications in an expeditious manner.[23]

11. Consistent with our intent to develop a comprehensive record, it is also necessary to elaborate on the scope of designated issue 4 pertaining to the adduction of mitigating evidence. On analysis, it appears that the scope of evidence to be considered by the parties in the KHJ-TV proceeding may have been unduly restricted. Mindful that this proceeding is the forum for determining RKO's basic qualifications generically, it is essential that, in addition to its showing concerning KHJ-TV, RKO be allowed to introduce all relevant and material evidence pertaining to its system-wide history, policies, and practices as a licensee. This will permit the ALJ to make an evaluation, based on the issues arising out of the Boston proceeding, of RKO's qualifications to remain the licensee of both KHJ-TV and its 13 other broadcast stations. Accordingly, RKO should not be limited merely to the introduction of evidence on the effectuation of those policies and practices at KHJ-TV.[24] This more expansive approach will facilitate our intention of reaching a definitive determination concerning the effects of the Boston issues on RKO's basic and comparative qualifications in the context of Phase one of the KHJ-TV proceeding. This desire for comprehension also compels that the parties be permitted to address the impact of the deterrent effect, if any, stemming from the decision to deny the renewal application for WNAC-TV, Boston, on RKO's basic and comparative qualifications. In the same vein the ALJ is directed to make specific findings on all designated issues. This will enable the Commission to consider all questions pertaining to both basic and comparative qualifications of RKO without the need to remand the proceeding for consideration of additional matters at a later date.

12. Questions have also arisen concerning the status of the 171 applications for RKO's 13 other broadcast stations. In our July 15,

---

[23] To the extent our rulings conflict with interlocutory determinations of the ALJ, those determinations are specifically overruled.

[24] To the extent that paragraph 10 of FCC 83–274, released June 8, 1983 and paragraph 16 of FCC 83–341, released July 15, 1983, are inconsistent with this holding, they are hereby overruled. Nonetheless, introduction of evidence pertaining to programming or other circumstances peculiar to any of RKO's stations other than KHJ-TV remains outside the scope of the specified issue and will be considered in due course in the context of the proceedings involving those 13 other broadcast stations.

1983 Order we adopted a plan staying the commencement of any proceedings involving those stations and suspending the time for filing amendments until further Commission order. We adopted this plan based on our view that it would be most conducive to the expeditious and unfettered culmination of the KHJ-TV proceeding. As a consequence of our action, 171 applications are now pending upon which no action will be taken until after the KHJ-TV proceeding is finalized. River City Communications Corp. (River City), an applicant in the Station WHBO-TV, Memphis Tennessee proceeding, challenges this procedure and urges the Commission to commence immediately the processing of the competing applications in that proceeding.

13. On further reflection, and in light of subsequent developments, we now agree that the processing of the 171 competing applications on file may commence at this time. While we remain convinced that the issues arising out of the Boston proceeding should be considered solely in the context of the KHJ-TV proceeding, we perceive no harm in initiating steps concerning the 171 competing applications now on file. Accordingly, we will direct the Mass Media Bureau to release appropriate List B cut-off notices,[25] begin processing these applications, and prepare appropriate designation orders for our consideration. We will also lift our suspension of rules 73.3522(a)(2), 73.3514 and 1.65 dealing with the filing of amendments. In sum, after carefully weighing all the potential courses of action that could be followed and considering the court's mandate to move expeditiously and to treat RKO's Los Angeles license in the same manner as the licenses for RKO's other thirteen stations,[26] we remain convinced that the adopted procedures as herein modified will best conduce to the proper dispatch of the Commission's business.

14. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed August 15, 1983, by Fidelity Television, Inc. IS DENIED.

15. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed August 18, 1983, by River City Communications Corp. IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

16. IT IS FURTHER ORDERED, That the Partial Petition for Reconsideration filed August 15, 1983 by Magna Media Corporation,

---

[25] We reject the argument of applicant Memphis Television Company, Limited Partnership, that there is no reason to reopen the B cut-off period for the WHBQ-TV proceeding. The B cut-off list issued in the WHBQ-TV proceeding was inadvertently released and was inconsistent with our intent to treat all applicants equally.

[26] *RKO General Inc.* v. *FCC*, *supra*, 670 F.2d at 237 and n.48; *New South Media Corp.* v. *FCC*, 685 F.2d 708, 710 (D.C. Cir. 1982).

Boston Radio Corporation, Potomac Broadcasting Corporation, East Lake Communications, Inc. and Adwave Company IS DENIED.

17. IT IS FURTHER ORDERED, That the Request for Extension of Time to File Petition for Reconsideration of FCC 83–341, filed August 15, 1983 by Micon Media, Inc. IS DENIED.

18. IT IS FURTHER ORDERED, That the Request for Extension of Time filed August 12, 1983 by Pro Tem RKO Hearing Representative Counsel IS GRANTED.

19. IT IS FURTHER ORDERED, That the parties to this proceeding ARE DIRECTED to proceed in accordance with this Memorandum Opinion and Order.

20. IT IS FURTHER ORDERED That the Mass Media Bureau SHALL COMMENCE PROCESSING the 171 pending applications filed in the 13 other RKO renewal proceedings in accordance with this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

**Cellular Communications Systems**
**Comparative Criteria**
**Comparative Hearing**
**Mobile Radio Service, Cellular Applications**

**Initial Decision affirmed granting cellular nonwireline application where one applicant's proposed system covers more area and population, its identification and analysis of demand was significantly more reliable, its system design and its proposed system will retain greater flexibility to expand in response to increasing demand overcomes opponent's slight preference for its highly usage sensitive rate structure (not rate levels).**
*-Rogers Radiocall, Inc. (Chicago)*
CC Docket No. 82–721

**Cellular Communications Systems**
**Comparative Criteria**
**Comparative Hearing**
**Mobile Radio Service, Cellular Applications**

**Initial Decision granting nonwireline cellular application affirmed with modifications. Judge's award of a preference for applicant's ability to accommodate demand for roamer service reversed. No preference was warranted since both applicants will provide roamer service and their systems are capable of accommodating this demand. No preferences awarded for service offerings, maintenance and personnel proposals and one applicant's proposal for minority and consumer participation.**
*-Rogers Radiocall, Inc. (Chicago)*
CC Docket No. 82–721

**Cellular Communications Systems**
**Comparative Criteria**
**Comparative Hearing**
**Mobile Radio Service, Cellular Applications**

**Initial Decision granting nonwireline cellular application affirmed with modifications. Judge's finding that fundamental principle of cellular design requires that the spacing between cells follow as uniform a pattern as possible and that one applicant's system would suffer intra-system interference in its initial configuration and as the system expands, reversed.**
*-Rogers Radiocall, Inc. (Chicago)*
CC Docket No. 82–721

FCC 84-62

BEFORE THE
**FEDERAL COMMUNICATIONS COMMISSION**
WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | CC Docket No. 82-721 |
| ROGERS RADIOCALL, INC. | File No. 26040-CL-P-(18)-82 |
| and | |
| CELLULAR MOBILE SYSTEMS OF ILLINOIS, INC. | File No. 26181-CL-P-(34)-82 |
| For a Construction Permit to establish a cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Chicago, Illinois, Standard Metropolitan Statistical Area | |

### *Appearances*

*Arthur Blooston* and *Chase Libbey*, on behalf of Rogers Radiocall, Inc.; *Edward P. Taptich* and *Charles C. Hunter*, on behalf of Cellular Mobile Systems of Illinois, Inc.; *James O. Juntilla*, *Jacob W. Mayer* and *Robert W. Spangler*, on behalf of the Separated Trial Staff, Common Carrier Bureau, Federal Communications Commission.

## FINAL DECISION

(Adopted February 24, 1984 Released March 6, 1984)

BY THE COMMISSION: Commissioner Quello concurring and issuing a statement; Commissioner Dawson issuing a separate statement.

### I. *Background*

1. This and a companion case involving the Pittsburgh market are the first two proceedings to reach the Commission for final decision under the expedited hearing procedures established in *Cellular Communications Systems*, 86 FCC 2d 469 (1981), *modified*, 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982). In this proceeding, Cellular Mobile Systems of Illinois, Inc. (CMS) has filed exceptions to the Initial Decision of Assistant Chief (now Acting Chief) Administrative Law Judge Thomas B. Fitzpatrick. *Rogers Radiocall, Inc.*, FCC 83D-49, released August 17, 1983. The Initial Decision (*I.D.*) granted the application of Rogers Radiocall, Inc. (Rogers) and denied CMS' mutually exclusive application. Judge

Fitzpatrick concluded that Rogers' application was superior under all of the designated issues[1] and that a grant of Rogers application' would best serve the public interest, convenience and necessity. CMS excepts to virtually every aspect of the *I.D.* For the reasons stated below, we affirm the *I.D.* as modified by this Final Decision and we affirm the grant of the Rogers application. Except as otherwise noted, the Findings of Fact and Conclusions of Law of the *I.D.* are incorporated by reference herein.

2. On October 21, 1982 we designated the mutually exclusive applications of Rogers and CMS for comparative hearing on the following issues:

> (a) To determine on a comparative basis the geographic area and population that each applicant proposes to serve; to determine and compare the relative demand for the services proposed in said areas; and to determine and compare the ability of each applicant's cellular system to accommodate the anticipated demand for both local and roamer service;
>
> (b) To determine on a comparative basis each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed Cellular Geographic Service Area (CGSA) in order to meet anticipated increasing demand for local and roamer service;
>
> (c) To determine on a comparative basis the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities); and
>
> (d) To determine, in light of the evidence adduced under the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience and necessity.[2]

The Common Carrier Bureau's Separated Trial Staff was also made a party to the proceeding.

3. Pursuant to the special procedures governing cellular radio applications in the top 30 markets,[3] Rogers and CMS filed their written direct cases with their applications on June 7, 1982. Written rebuttal cases were filed December 27, 1982. An evidentiary admissions session was held February 17, 1983 at the Offices of the Commission. Evidentiary hearings to permit cross-examination of three of the applicants' witnesses were held April 11 to April 13, 1983. At the conclusion of those hearings, the Presiding Judge closed the record. Proposed Findings of Fact and Conclusions of Law were filed by all parties on May 16, 1983; Reply Findings and Conclusions were filed ten days later.

4. The *I.D.* awarded Rogers a substantial preference under Issue (a) for its proposed geographic area and population as well as its

---

[1] See para. 2, *infra.*

[2] Advanced Mobile Phone Service, Inc. (Chicago Order), 91 FCC 2d 512, 520–521 (1982) (footnotes omitted).

[3] Cellular Communications Systems, 89 FCC 2d 58, 87–91 (1982). *See also* 47 CFR 22.916(b)(1).

identification of and ability to accommodate demand for local service. CMS received a slight preference for its more convenient roamer service. *I.D.* Conclusions, paras. 2–11. Rogers also was awarded a substantial preference under Issue (b) for its proposal concerning system expansion. *I.D.* Conclusions, paras. 12–14. Although CMS received a slight preference for its proposed rate structure, Rogers received a slight preference on Issue (c) overall based on its maintenance and personnel proposals. Accordingly, the judge found Rogers' proposal to be superior to CMS'.

5. CMS filed its exceptions to the *I.D.* and a Motion to Reopen the Record on September 23, 1983.[4] Replies were filed by Rogers and the Separated Trial Staff on October 7, 1983. CMS also filed a Motion for Oral Argument asserting that such argument was necessary to permit a reasoned resolution of the exceptions and to provide precedential guidelines for future cellular proceedings. We agreed that oral argument would aid in the resolution of the issues without unduly delaying final resolution of this proceeding. We therefore granted CMS' request. *Rogers Radiocall, Inc.*, FCC 83–581, released December 9, 1983. A motion for oral argument in the Pittsburgh cellular proceeding was granted concurrently. *MCI Cellular Telephone Company*, FCC 83–580, released December 9, 1983. Oral argument was held in both cases on January 10, 1984.

6. We note at the outset that the comparative process has not resulted in our finding that one of the applicants is unqualified to operate a cellular system or that one of the proposals is unworkable. The applicants propose different technical solutions to the problems of cellular system design. Our selection of Rogers' application over CMS' does not indicate that Rogers' approach is the only feasible one. Moreover, we believe that the inherent flexibility of the cellular concept would allow either applicant to reconfigure its system in order to meet the requirements of the marketplace.

7. In this proceeding, however, we are constrained to compare the applicants on the basis of the systems they have proposed, not on the basis of what might ultimately evolve.[5] We find that, based on the record before us, there are differences between the applicants

---

[4] CMS filed a Petition for Leave to Supplement Motion to Reopen the Record on January 20, 1984, ten days after oral argument. This supplement is an untimely attempt to bolster CMS' comparative case; accordingly the petition will be denied. On February 6, 1984, CMS filed an amendment to its application pursuant to Section 1.65 of the Commission's rules to inform us that its parent had hired a Vice President, Technical Services. While this amendment will be accepted in order to keep CMS' application current, it has no effect on our decision in this proceeding.

[5] It is worth noting the likelihood that substantial modifications will be made in the proposed system when it is built. We recognize that the system designed to win the license may not be the system designed to serve the public. For the opinions of two engineers experienced in cellular system design, see "Re-engineering Often Necessary Says Systems Contractor," *Cellular Business*, January/February 1984, at 8–9. Nevertheless, in a comparative hearing we must base our decision on the systems proposed.

sufficient to make a choice under the comparative criteria previously established. As we have already stated, however, we believe that either applicant is capable of providing cellular service to the public. Given this fact, it is debatable whether the public ultimately benefits by our selection of the applicant that is superior with regard to our comparative criteria, in view of the costs in time and resources to the applicants and our staff, and the delay in providing service to the public that the hearing process entails.[6] Despite these reservations about the value of the comparative process, we find that the *I.D.* should be affirmed.

## II. *Issue (a)*

8. Issue (a) calls for a comparison of the geographic areas and population that the applicants propose to serve, the relative demand for service and the applicants' ability to accommodate demand for both local and roamer service.[7]

9. *Geographic Area and Population.* The judge found that the Chicago Metropolitan Statistical Area (MSA) encompasses a total land area of 3,724 square miles in six counties and has a total population of 7,103,624. The areas and population proposed to be served by the applicants are represented in the following table.

| | *Geographic Area Served*[8] | | *Population* | |
|---|---|---|---|---|
| Rogers | 3,213 | 86.3% | 7,005,000 | 98.6% |
| CMS | 3,086 | 82.9% | 6,947,000 | 97.8% |

*I.D.* Findings, para. 5.

10. Judge Fitzpatrick found that, in addition to the differences apparent from the above table, Rogers' coverage "pockets" (*i.e.*, areas proposed to be served by Rogers but not by CMS) would generate thirty more users and contain more special user concentrations (such as significant traffic interchanges) than CMS' pockets. Rogers'

---

[6] In this connection, we point out that the Commission has pending a Notice of Proposed Rulemaking to adopt a lottery procedure for selecting cellular licensees with less delay. *Cellular Lottery Notice*, FCC 83-460, 48 Fed. Reg. 51493 (released November 11, 1983). Our decision today is without prejudice to any action we may take in that proceeding. In addition, we have long encouraged settlements between applicants for cellular systems, which tend to minimize the administrative costs to the parties and the Commission as well as eliminate the delays inherent in the hearing process. We can only express our disappointment that a settlement was not reached in this case.

[7] In Cellular Communications Systems, 86 FCC 2d at 502, we stated that the geographic area that an applicant proposed to serve would be a major basis of comparison. We also noted that "the presence of densely populated regions, highways, and areas likely to have high mobile usage characteristics as well as indications of a substantial public need, including the results of public need surveys" would be significant factors to consider.

[8] For purposes of comparison the geographic area served is that area within the applicant's composite 39 dBu contours within the MSA. The percentages given are of the total area and population of the Chicago MSA.

pockets also cover a hospital and an army munitions plant and contain primarily municipal service areas and rural centers. CMS' pockets, on the other hand, are primarily agricultural. *I.D.* Findings, para. 6; Rogers Rebuttal Exhibit 15, pp. 4–5, 12–13.

11. On the other hand, the judge found that CMS had greater "depth of coverage" than Rogers, *i.e.*, CMS proposes more extensive cell overlap. CMS contends that depth of coverage enhances the quality and reliability of cellular service by providing multiple transmission paths to or from a given location. Depth of coverage is also asserted to allow greater flexibility to accommodate shifting demand and to provide better building penetration.

12. Based on the evidence Judge Fitzpatrick concluded that Rogers' proposed coverage of area and population was superior to CMS'. The judge noted that the Commission has specified that the presence of densely populated regions and high mobile usage areas are significant factors in comparing areas and population served.[9] Rogers' pockets in particular demonstrated Rogers' superiority in this regard. Furthermore, although CMS admittedly proposed greater depth of coverage, the judge declined to grant comparative credit because depth of coverage did not come within any of the designated issues. The judge also declined to grant comparative credit for CMS' depth because its advantage will be reduced by cell-splitting and sectorization and because CMS had failed to demonstrate that Rogers' depth of coverage was inadequate to accommodate demand. Finally, the judge concluded that CMS could not be preferred on this issue because its cell overlap would generate undue co-channel intrasystem interference.[10] *I.D.*, Conclusions, paras. 3–5.

13. CMS excepts to the judge's grant of a preference to Rogers and denial of comparative credit for its depth of coverage. CMS considers the coverage differences, including Rogers' pockets, to be insignificant. Furthermore, CMS contends that Judge Fitzpatrick relied exclusively on residential population statistics to compare the applicants' coverage proposals even though there is no necessary correlation between such statistics and demand for cellular service. Finally, CMS excepts to the judge's conclusion that its proposal for depth of coverage not be accorded comparative credit on the ground that its depth of coverage will assure greater building penetration, better service to portable units and redundancy in the event of technical problems in one cell.

14. We find no basis to overturn Judge Fitzpatrick's conclusion that Rogers' coverage proposal is superior. CMS correctly points out that there is not necessarily any correlation between residential population and demand for cellular service. However, the *I.D.* does not rely solely upon the differences in population covered by the applicants. Rather, Judge Fitzpatrick took seriously our admonition

---

[9] 86 FCC 2d at 502.

[10] This allegation will be discussed in greater detail in Part III, *infra*.

that "significant factors to be considered will be the presence of densely populated regions, highways, and areas likely to have high mobile usage characteristics."[11] In this case, Rogers has demonstrated that its non-common areas of coverage are likely to have a significantly higher level of demand for cellular than those contained in CMS' system. Finally, we agree with the judge that CMS' proposed depth of coverage does not merit comparative credit. CMS has not demonstrated that building penetration and service to portables would be inadequate without its proposed depth of coverage. We therefore affirm the judge's conclusion that Rogers' proposal is superior to CMS' in this regard. Rogers will therefore receive a slight preference.

15. *Relative Demand for Service.* Both Rogers and CMS conducted demand surveys to determine the level of demand anticipated in the Chicago MSA and to enable them to design their systems to accommodate both present and future demand for service. The *I.D.* contains lengthy findings of fact with regard to the methodologies employed by both applicants. Based upon these findings Judge Fitzpatrick concluded that Rogers had provided "a significantly more reliable analysis of the extent and distribution of demand for cellular service in the Chicago SMSA."[12] The demand projections made by both applicants are shown in the following table.

| *Year of Operation* | *Rogers*[13] | *CMS*[14] |
|---|---|---|
| 1 | 7,120 | 4,802 |
| 2 | 9,560 | 11,214 |
| 3 | 12,331 | 19,188 |
| 4 | 17,881 | 25,585 |
| 5 | 25,618 | 31,959 |
| 6 | 31,921 | None |
| 7 | 38,575 | None |
| 8 | 44,698 | None |
| 9 | 50,145 | None |
| 10 | 54,923 | None |
| 11 | 58,573 | None |

16. CMS takes exception to the judge's conclusions. First, CMS contends that, because the demand projections submitted by the applicants were fairly close, the judge should not have compared survey methodologies. CMS states that the purpose of comparing the applicants' need showing is simply to ensure that they would be able

---

[11] 86 FCC 2d at 502.

[12] *I.D.*, Conclusions, para. 6.

[13] Rogers' demand figures represent its estimated 40 percent share of the total projected number of units in service in the Chicago market. These figures are based on an "expected" scenario. Rogers has assumed that 1985 will be its first year of operation. (Rogers Direct Case Exhibit 11, p. 49).

[14] CMS states that its projected fifth year demand, 31,959, represents "the total market need for Chicago cellular telephones" based on 1980 census figures. (CMS Direct Case, Exhibit II, p. 14). CMS has not stated when service would commence.

to accommodate the forecasted demand. CMS then argues that its survey methodology is superior to Rogers' and that Rogers' survey had major flaws. CMS asserts that it demonstrated that paging is a precursor to cellular and that its survey results confirm that paging users are more likely to use cellular than are non-users. CMS also excepts to the judge's observation that CMS' demand projections appeared not to consider the presence of a wireline carrier in Chicago. Finally, CMS contends that it derived its projected first year demand from its fifth year demand level by use of well-known product diffusion theories. To evaluate these exceptions, it will be helpful to review the methodologies of the two applicants.

17. CMS' Survey Methodology. CMS conducted six surveys of businesses in the top thirty MSA's and in Chicago. Although CMS claims to have used all six surveys in its demand projections it acknowledges that it relied primarily on two: one conducted by Claritas Corp. and the other by Westat, Inc. (CMS Proposed Findings, para. 41). The judge's findings with respect to CMS' six surveys will be discussed briefly in the following paragraphs.

18. The Claritas survey estimated demand for cellular based upon pager penetration in four or six unnamed markets.[15] Data comprising 5,541 accounts of "representative" customers were obtained from affiliates of CMS' parent, Graphic Scanning, offering paging service in those markets. Claritas then coded these accounts by standard industrial classification (SIC) codes and projected demand for paging services. For the Chicago MSA Claritas projects 23,470 accounts and 67,155 pagers. The study assumes that the penetration of the Graphic Scanning affiliates into the SIC codes is representative of the paging industry; that the sample was properly drawn and reflects the affiliates' penetration; and that the markets studied are representative of the national market.

19. The Westat study provided an area profile of Chicago business and a cellular market survey. The first section of the study is a demographic profile of the Chicago MSA. The second section describes vehicular traffic patterns and key metropolitan facilities and includes a map showing traffic volume in the MSA and projections of population and business growth by the year 2000. Finally, Westat conducted a telephone survey of private establishments in the top 30 MSAs. This resulted in 2,251 completed interviews, of which 80 were in Chicago. In order to derive gross estimates of market demand in Chicago, Westat employed a "synthetic estimate" procedure in which the data for all top 30 MSAs were combined and a weight of .3 was assigned to the relevant Chicago market area. The Westat survey, when adjusted for nonres-

---

[15] It is not clear whether the Claritas survey was conducted in four or six markets; conflicting statements are made in CMS' Direct Case. *See*, CMS Direct Case, vol. 2, Section I, pp. 2 and 3.

ponse, estimates a need for 95,000 mobile units and 86,900 portable units during the first five years of service in Chicago at a monthly cost of $110 among establishments reporting likely or probable cellular use.

20. Graphic also performed two telephone surveys and two mail surveys. In both cases Graphic conducted one survey of the general Chicago business population and the other of its Chicago paging customers. Figures for anticipated demand were then projected from these data.[16]

21. Based on the above analyses, CMS witness Roger Paradis maintained that Graphic Scanning was able both to categorize major MSAs according to their relative need for personal communication services, and to measure the projection of absolute need within each CGSA. CMS determined that each MSA would fall within one of three usage bands - low, medium or high. Markets apparently were classified based on the local mix of paging intensive SIC codes. Chicago was found to be a low-band market which means, according to CMS' analysis, that it has a projected need of 4.5 cellular units per thousand population.[17] Multiplied by the total population of the MSA, this yields 31,966.[18] CMS' first year demand projection of 4,802 units was calculated by a formula used in other CMS markets, multiplying the fifth year projection by a factor of 15% (TR 429–431). Paradis explained that Graphic Scanning used maps showing densities of total households for the MSA, densities of households with incomes of $50,000 or more, traffic pattern information and concentrations of place of employment and places of pedestrian gatherings to project models of cellular system usage. However, no more specific information was given on how these models were developed. CMS Direct Case Exhibit II, p. 5.[19]

22. Rogers Survey Methodology. Rogers' demand forecast is based on a market study conducted by Compucon, Inc., an engineering and marketing firm. In support of this study effort Walker Research Corp. conducted a survey of 469 randomly selected businesses in the Chicago MSA. Forty-one percent of the respondents were "somewhat" or "very" interested in cellular service at an unspecified "reasonable price." Walker also determined that demand for service and the number of units respondents were interested in acquiring fluctuated with price.

---

[16] The judge's findings with respect to CMS' survey methodology are set out at *I.D.*, Findings paras. 15–16.

[17] In its Direct Case CMS stated this as .0045 units per 1,000 population. Apparently this was an error.

[18] CMS' projected fifth year demand was 31,959 rather than 31,966. It is not clear whether the discrepancy in figures is the result of a computational error on the part of CMS or the use of an incorrect figure for total MSA population.

[19] The maps to which Paradis refers are those attached to the end of Volume 3 of CMS' direct case.

23. Based on the survey data Compucon forecast the need for cellular service in the Chicago MSA. Numerous key variables were considered in arriving at these projections. Demand levels were then projected for every year from 1985 to 1995 assuming a constant rate of business growth and a gradually increasing market penetration. Compucon then distributed the projected demand throughout the MSA. Data were collected on a census tract level on demographic factors considered to be important indicators of cellular demand. Compucon then determined which areas were considered likely high usage potential areas and distributed its forecasted demand accordingly.[20]

24. The judge concluded that Rogers had provided "a significantly more reliable analysis of the extent and distribution of demand for cellular service in the Chicago SMSA." *I.D.*, Conclusions, para. 6. The judge further concluded that the Walker survey contained all the information necessary to establish its reliability and that Compucon had used the data generated by the survey to forecast demand and distribute it over the MSA. Judge Fitzpatrick believed that, although certain assumptions underlying the forecast were unproven, they appeared to be reasonable and both the assumptions and Compucon's methodology were explicitly stated.[21] By contrast, the judge concluded that CMS' public need showing suffered from major inadequacies. For example, he noted that all six surveys submitted by CMS indicated different levels of demand and that it was not clear how these results supported CMS' ultimate projections. The judge also concluded that it was not clear how CMS had used its demographic data to distribute demand over the MSA. Finally, the judge rejected the assumptions on which CMS' need showing rested: that demand for cellular is linked to demand for paging and that there is a consistency of demand among markets.

25. We are convinced that the judge correctly concluded that Rogers provided a significantly more reliable analysis of the extent and distribution of demand in the Chicago MSA. Importantly, Rogers used its analysis of demand in designing its system. Only by projecting the level and distribution of demand for cellular service can an applicant design a system to accommodate demand. Rogers has clearly done a better job in this regard. The mere fact that the demand levels projected by CMS and Rogers for certain years appear to be similar does not detract from this conclusion.[22] Rogers based its

---

[20] Rogers' survey methodology is discussed in greater detail in the *I.D.*, Findings, paras. 10–14.

[21] Compucon assumed 1) that service would be available by January 1, 1985; 2) that cellular would be primarily a business oriented service, at least initially; and 3) that price and demand relationships that it used in its projections would hold true throughout.

[22] As the judge observed, CMS states that "[b]ased on the 1980 Census population count, CMS is projecting *the total market need* for Chicago cellular telephones to

forecasts on interviews of Chicago area businesses. The demand projections considered a variety of factors—such as cost, business growth and market penetration—that are likely to affect demand for cellular. Rogers took the further step of distributing demand throughout the MSA on the basis of meticulously projected high potential usage areas. These projections also considered relevant demographic variables likely to be indicators of cellular demand, such as construction activity, high income residential development, heavy traffic flow and major planned thoroughfares. Rogers was therefore able to base its channel allocation design on data indicating where demand is likely to occur in the Chicago MSA. Accordingly, Rogers is entitled to a preference in this area.

26. We agree with the judge's conclusion that CMS' methodology has serious shortcomings. For example, although CMS has suggested reasons why it used paging as a product precursor for cellular, it has not demonstrated a direct link between demand for paging and demand for cellular. Nor does CMS explain how or why it projected units per thousand population when it surveyed only businesses. CMS argues that Rogers' demand forecasts are based on unproven assumptions as are CMS'. Clearly, any demand projection must assume certain facts which are not susceptible to proof in order to take account of all relevant factors.[23] The applicants differ in this regard in that Rogers has explicitly stated its assumptions and forecasting methodology and both appear to be reasonable. CMS has failed to submit evidence on which a similar finding could be made with respect to its demand projections. CMS did not demonstrate that the assumptions underlying the Claritas survey are reasonable or that the survey itself is relevant to the Chicago market.[24] Nor is it clear how, if at all, CMS used the results of the Westat survey or its four surveys of Chicago businesses.[25] For the foregoing reasons, we affirm the judge's conclusion that Rogers has provided a significantly more reliable analysis of the extent and distribution of demand for cellular service in Chicago.

27. *Ability to Accommodate Local Demand*. The judge concluded that Rogers had demonstrated a superior ability to accommodate

---

be 31,959 units." (CMS Direct Case, Exhibit II, p.14. Emphasis added). Thus, CMS does not appear to have accounted for the Chicago wireline carrier in its projections as Rogers did.

[23] Rogers assumes, for example, that the rate of business growth for each year from 1985 to 1995 will be 0.7%.

[24] The Claritas survey was conducted in either four or six unnamed markets where CMS' parent, Graphic Scanning, has paging affiliates. The markets were asserted to be representative in that they were stable, well-developed and well-dispersed geographically. The study further assumed that Graphic's penetration into the SIC codes studied is representative of the paging industry. No information is provided to demonstrate the reasonableness of any of these assumptions.

[25] A flow chart included as page 13 of CMS' Direct Case Exhibit II suggests that they were used to verify CMS' projection of cellular units per population. How this was done is not stated.

local demand for cellular service. The judge found that Rogers' proposed system design, and in particular its channel allocation, was based upon its demand forecasts. While the judge concluded that both applicants' 39 dBu contours covered most of their respective projected high usage areas, CMS did not demonstrate that it had used its market studies to develop its channel allocation. The judge also concluded that Rogers would maintain a higher grade of service than CMS.[26] Finally, Judge Fitzpatrick concluded that CMS' switching capacity would be inadequate to serve the number of voice channels it initially proposed.

28. CMS excepts to the judge's conclusions. CMS asserts that its system design is superior to Rogers' because its cell overlap results in more channels being assigned to a given geographic area. According to CMS, this demonstrates that its channel distribution is market specific. The greater cell overlap of CMS' system is also said to give CMS greater flexibility to accommodate demand in case demand does not conform to its distribution projections. Finally, CMS takes exception to the judge's conclusions that it will suffer signalling channel interference and that its switching capacity is inadequate.[27]

29. Initially, we note that we do not rely upon the judge's conclusions regarding CMS' switching capacity and signalling channel interference. CMS was prepared to submit evidence showing that its switching capacity was adequate to handle its first year complement of 301 voice channels. We believe this evidence should have been admitted. However, because our decision of this issue is not dependent upon this factor, the judge's ruling was harmless error. We affirm the judge's conclusion that CMS would suffer co-channel interference due to the assignment of a common signalling channel to two overlapping cells. CMS asserts that this was the result of a clerical error but its proffered amendment was untimely and was therefore properly rejected by the judge.[28] However, because the

---

[26] Grade of service is defined as the probability that a call will be blocked. Rogers projects grade of service based on the Poisson traffic formula while CMS uses Erlang B. Rogers' system design requires more channels because of the assumptions on which these formulas are based.

[27] CMS also contends that it is better qualified than Rogers to implement a cellular proposal due to the experience and technical expertise of its parent, Graphic Scanning, and that it therefore deserves a preference. We reject this argument as frivolous because both applicants have demonstrated comparable technical expertise. Both applicants are qualified to implement a cellular proposal. There is no basis for awarding CMS a preference on this ground. Indeed, as the judge found in the *I.D.*, Rogers' parent is the largest radio common carrier in the state of Illinois. *I.D.*, Findings, para. 3.

[28] A footnote to CMS' *Supplement to Testimony of J.D. Wells*, filed March 11, 1983, asserted that signalling channels had been inadvertently transposed and that a corrective amendment would be filed. This amendment was not filed until April 7, 1983. In our Cellular Amendments Order, 53 RR 2d 1198 (1983) we stated that, where good cause has been demonstrated, the Administrative Law Judge may grant leave to file post-designation amendments. It was clearly within the

interference problem can be readily solved it is not decisionally significant.

30. We affirm Judge Fitzpatrick's conclusion that Rogers deserves a preference for the manner in which it proposes to accommodate local demand.[29] Rogers' channel allocation plan is based upon its demand distribution forecast. Rogers' system is therefore designed to accommodate anticipated demand. In contrast, the judge found that CMS had not relied on forecasts of demand distribution in the Chicago MSA in developing its channel allocation plan. The record supports this finding. Moreover, CMS has not demonstrated that its traffic distribution model has any relevance to Chicago. Nor are we persuaded by CMS' arguments that its system design is superior to Rogers'. Essentially, CMS asks us once again to give its "depth of coverage"[30] design philosophy comparative credit. Once again, CMS has failed to demonstrate that its design is superior and will therefore receive no comparative credit.

31. *Ability to Accommodate Demand for Roamer Service*. Both Rogers and CMS propose to provide service to roamers registered with their Chicago systems. Under Rogers' proposal the roamer would receive a special temporary number. He could then place calls freely and could receive calls via an operator or by activation of call forwarding from his home system. Roamers in CMS' system could, at their option, be reached by dialing an access number followed by the number assigned to the roamer in his home system. The judge awarded CMS a slight preference for its more convenient provision of roamer service. In its exceptions CMS contends that it should receive a more significant preference for its roamer service. CMS contends that Rogers will have to reserve blocks of numbers to assign to roamers while CMS will only have to reserve sufficient access

---

discretion of the judge to reject the amendment, particularly in view of the fact that it was filed virtually on the eve of hearing. Ultimately, whether the amendment should have been accepted is essentially irrelevant because we regard the interference problem as decisionally insignificant.

[29] To the extent that the judge granted Rogers comparative credit based upon what he characterized as CMS' lower grade of service we are reversing his decision. Both the Poisson and Erlang B formulas are appropriate models for use in cellular design. The difference in resulting grades of service is a function of the differing assumptions on which the formulas are based. The Poisson formula gives a probability that over a time period equal to average call length all channels will be busy, while the Erlang B formula gives a probability that at any given time all channels will be busy. *See generally* P. Beckman, Elementary Queuing Theory and Telephone Traffic at 11–13, 16, 21–22, 24–26 (ABC of the Telephone, Traffic Series 1977). Since the assumptions underlying Poisson are not necessarily more accurate than those underlying Erlang B, we do not believe Rogers should receive credit for having used the Poisson model.

[30] As explained in para. 11, *supra*, depth of coverage is achieved by overlapping cells. CMS contends that its design provides more channels in likely high demand areas. However, this is contrary to the evidence of record. *See*, Rogers Reply to Exceptions of CMS, p.15; Rogers Direct Case Exhibit 1, pp.60–62, 175–176, 189–190.

lines to accommodate expected roamer traffic. All of these contentions address the treatment to be accorded roamers and not the applicants' ability to accommodate the anticipated demand for roamer service. These arguments are therefore irrelevant to a comparison of the applicants on this issue. The record supports a finding that both applicants are capable of offering service to roamers. Neither applicant has demonstrated superiority in this regard. Accordingly, no preference will be awarded on this issue.

### III. *Issue (b)*

32. Under Issue (b) the proposals of the applicants to expand their systems to accommodate increasing demand were compared. The judge concluded for a number of reasons, some of which have already been discussed under Issue (a), that Rogers' expansion plan is superior to CMS'. CMS excepts to the judge's conclusions. CMS contends that Rogers' expansion plan lacks specificity and that CMS' plan to expand through channel addition during its first five years of operation is superior. In addition, CMS excepts to the judge's other findings and conclusions regarding deficiencies in its expansion plan.

33. Rogers will begin expanding its initial 18 cell system in its second year of operation. Between 1986 and 1989 Rogers' first level cell split will result in a 49 cell system with 46 sectorized cells. A second level cell split is scheduled to occur between 1990 and 1993. Rogers will expand its capacity by channel addition or cell splitting when the grade of service of the cell with the heaviest traffic consistently approaches .05. *I.D.*, Findings, para. 25–26.

34. CMS has configured its system to accommodate its projected fifth year demand. No additional cells will be required during the first five years of operation; however, CMS will sectorize 20 of its cells in that time period. During its first five years, CMS will increase its system capacity through channel addition and cell sectorization. CMS will expand when the grade of service at any cell equals or exceeds .05 on 21 of the preceding 30 days.

35. The judge concluded that Rogers had presented the superior plan for system expansion. Accordingly, Rogers received a substantial preference under Issue (b). The judge concluded that CMS' expansion plan, like its demand forecast, was not tailored to the demands of the Chicago market. Moreover, the judge believed that, because CMS' initial system is configured to meet projected fifth year demand, its expansion plan will require substantial modification if the extent and distribution of demand for cellular proves to be other than CMS anticipates. Consequently the judge concluded that Rogers' phased-in approach was superior. In addition, the judge preferred Rogers because he concluded that CMS' switching capacity was inadequate for the number of channels in its fifth year system; because CMS will allow its grade of service to deteriorate to a lower level than Rogers'; because CMS will suffer undue intra-system

interference; and because Rogers will have a higher "frequency reuse ratio."

36. We agree with CMS that a number of the judge's findings and conclusions with respect to Issue (b) are erroneous and must be corrected. First, we find that the judge erred in refusing to accept CMS' proffered evidence that its switching capacity was adequate. See para. 29, *supra*. We appreciate the judge's evident concern that this proceeding be concluded expeditiously so that the public might begin receiving service at the earliest possible date. In this instance, however, we believe the judge's ruling has left the record incomplete on this issue. Therefore, in order to prevent any unfairness to CMS, we will assume for the purpose of this discussion that CMS' switching capacity is adequate.[31]

37. Secondly, we do not agree that Rogers is to be preferred on the basis of its proposed grade of service. In the first year both applicants propose a grade of service of .01. After the first year Rogers proposes a design grade of service of .02 while CMS proposes to maintain a .01 grade through its third year. CMS' precise objective after the third year is not clear. *See*, CMS Direct Case, Exhibit IV, pp. 13–14. However, we do not believe that the record supports a finding that CMS intends to lower its grade of service to .05. CMS clearly stated that this was not its intention. *Id.* However, since CMS' direct case does not establish that its grade of service would be superior to Rogers', we cannot accord CMS a preference either. Finally, we do not believe it is appropriate to award Rogers a preference for using the Poisson traffic formula as the *I.D.* implies. *See*, *I.D.*, n. 25.[32]

38. We also decline to give comparative credit to either party on the basis of its "frequency reuse ratio," an issue first raised by CMS in its Rebuttal case and subsequently adopted, with modifications, by the judge.[33] We believe that either formulation of frequency reuse

---

[31] As the record stands it is not clear what the capacities of the various switches proposed to be used by CMS are. The confusion in this regard stems mainly from CMS' failure to present evidence on this point in its direct case.

[32] While it is true that a .01 grade of service using Poisson requires a greater number of channels for the same level of traffic than .01 using Erlang B, this is because of their differing assumptions. Essentially, Poisson assumes a higher traffic load than Erlang B. It has not been demonstrated that Poisson's assumptions of caller behavior are more valid than those of Erlang B. If, in fact, Erlang B should be more accurate, then use of the Poisson formula would result in system over-building. Therefore, to the extent that Rogers received a preference on this basis, the *I.D.* is overruled. In any event, the grade of service proposed by either applicant would be acceptable to the consumer.

[33] As proposed by CMS, the frequency reuse ratio is determined by dividing the number of cells in the system by the frequency reuse pattern to be employed. CMS apparently hoped to demonstrate that its four cell reuse pattern is superior to Rogers' seven cell pattern. The judge, however, concluded that a better way to determine the frequency reuse ratio was to divide the total number of voice channels proposed to be used in the system by the number of voice channels (312)

ratio is irrelevant to a comparison of the applicants. CMS essentially asks us to grant a preference for its four cell reuse pattern over Rogers' seven cell pattern. Both systems are feasible cellular designs; each has its own advantages and disadvantages. Therefore, in accordance with our policy of affording cellular system operators maximum flexibility in designing their systems, *see* 86 FCC 2d at 507, we will not grant a preference to either system. This recognizes the public interest in the development of alternative technical design approaches that fully comport with our broad cellular design concept.

39. Judge Fitzpatrick's formulation of the issue was clearly a response to the statement in our *Report and Order* that in comparing applicants' ability to respond to increasing demand, "preference will be given to designs entailing efficient frequency use. Efficient frequency use entails not only the applicant's plans with regard to cell-splitting and additional channels, but also the degree of frequency reuse the system is and will be capable of." 86 FCC 2d at 503. In licensing cellular systems, however, the concept of "spectrum efficiency," as used in the context of allocation proceedings, is not of decisional significance. Indeed, we did not specify "efficient frequency use" as a comparative issue. The degree of reuse achievable, one component of the applicant's system design, is a question of cell size. A system that proposes a large number of small cells will be capable of a greater degree of frequency reuse than one that proposes larger cells. On the other hand, a system with a large number of small cells will be more expensive to construct and maintain, and more complex to operate.[34] Ultimately, the demographics and demand characteristics of each particular market will dictate the optimal design. Accordingly, there is no rational basis to prefer one applicant over another merely because of its more intensive reuse of frequencies. A system that is shown to be capable, through reuse, of accommodating the expected growth in demand will be preferred over an applicant whose system design does not permit sufficient reuse to provide the capacity to meet that demand. But in the absence of such a showing, the degree of reuse is of little significance as a basis for comparison. In the case before us, both applicants propose to expand their system capacity by channel addition and cell-splitting. The proposals of both applicants are generalized, in keeping with the notion that a cellular system is inherently flexible. The record does not establish that one applicant's expansion plan will be able, through reuse, to accommo-

---

available in the 20 MHz of spectrum. This yields the average number of times a channel is reused. Under this method Rogers had a higher value. Both views are rejected.

[34] In the *Report and Order*, we recognized that not all cellular systems would require frequency reuse initially, but that applicants must demonstrate their ability to reuse frequencies when necessary. 86 FCC 2d at 507.

date the expected growth in demand for service and the other will not. Accordingly, neither Rogers nor CMS will be preferred on this ground.

40. The conclusion that CMS will suffer undue intra-system interference must also be reversed. First, the record does not indicate that the initial configuration of CMS' system will suffer intra-system interference among the voice channels as opposed to the signalling channels (see para. 29, *supra.*) *I.D.*, Findings para. 29. Rather such interference will occur, if at all, only in later years as CMS adds channels and splits cells. CMS Direct Case Exhibit III, p. 20; Exhibit IV, pp. 17–19. Moreover, some degree of intra-system interference is to be expected in any maturing cellular system.[35] Such interference can be managed effectively because all of the potentially interfering transmitters are under the control of the same carrier.[36] Most importantly, CMS' proposal would not prevent CMS from implementing its system, nor would it result in interference to any other system. Accordingly, CMS should not have received a demerit based on its potential for intra-system interference.[37]

41. We emphasize that we do not favor one system design over another. Both Rogers and CMS have presented *bona fide* cellular designs. We reject the ALJ's holding that there is a "fundamental principle [of cellular design] that the spacing between cells should follow as uniform a pattern as possible to achieve optimal coverage

---

[35] The technical reports on the AT&T developmental program, on which the Commission based its finding in the cellular rulemaking that small-cell systems were technically feasible, *see* 86 FCC 2d at 473, characterize a small-cell system as "interference-limited." In other words, the effective coverage of a transmitter is limited by the existence of co-channel interference from other transmitting locations. *See, e.g.*, Advanced Mobile Phone Service, Developmental System Report No. 10, at A II-1, A II-4, A II-5 (filed Aug. 27, 19790.

[36] The undesired effects of interference may be mitigated by adjusting transmitter power levels. *See* Advanced Mobile Phone Service, Developmental System Report No. 9, at A II-5 to A II-7 (filed May 29, 1979)

[37] We note also that the judge mistakenly used FCC Report No. R-6406, "Technical Factors Affecting the Assignment of Facilities in the Domestic Public Land Mobile Radio Service," by Roger B. Carey (Carey Report) to project intra-system interference. *See, I.D.*, n. 36. The Carey Report was adopted as the Commission's interim standard for determining reliable service areas and inter-system interference pending the development of more definitive propagation models. *See*, 86 FCC 2d at 508. The Carey Report and other propagation models, however, are useful only insofar as they are used for predicting theoretical levels of signal strength under average conditions. *See Domestic Public Land Mobile Service*, 47 RR2d 666 (1980). In small-cell systems, local propagation effects may vary substantially from theoretical predictions. Technical field tests will be necessary in establishing any small-cell system to determine actual signal strengths, after which power levels may be adjusted. *See, e.g.*, Advanced Mobile Phone Service, Developmental System Report No. 9 at AII-5, AIII-3 to AIII-4. Such changes are considered minor unless they result in the extension of Carey contours beyond the licensee's CGSA. 86 FCC 2d at 509.

with minimal intra-system co-channel interference." *I.D.*, Findings, n.36. We recognize that the use of a regular polygonal (generally hexagonal) grid in cellular system planning is viewed as "help[ing] to systematize the design and layout of cellular systems."[38] That does not mean, however, that a uniformly spaced pattern is a fundamental design requirement.[39] A cellular system not based on a uniform grid may require some fine-tuning in the course of expansion,[40] but any cellular system will require a degree of adjustment in response to unexpected propagation effects or usage patterns.[41] In adopting its cellular rules and policies the Commission sought to avoid imposing any rigid system design concepts in order to permit applicants the flexibility (within certain parameters) to design their systems in different ways. 86 FCC 2d at 507. CMS' design concept, while different from that utilized by other applicants, appears to be viable and consistent with our general requirements for system design. We will not assess CMS a demerit merely because it chooses not to follow the conventional wisdom.

42. Rogers also received a preference for the greater flexibility of its phased-in expansion approach. CMS argues that its design is actually more flexible than Rogers' because its greater degree of cell overlap will enable it to borrow channels to accommodate actual demand. Flexibility is the touchstone of cellular technology. We recognize that in many respects the systems that are ultimately built will differ from the applicants' proposals. Both applicants will retain the flexibility to adapt their plans to meet actual demand. This is particularly true with regard to the applicants' proposals for system expansion. As experience better enables the carrier to assess the needs of the market we fully expect its plans for expansion to change.

43. We believe that CMS' proposal to build its initial system on the basis of its projected fifth year demand is inherently somewhat less flexible than Rogers' proposal. If cellular demand in Chicago should be significantly different than CMS projects, its 34-cell system may well not be responsive to the needs of the market. In view of the unreliability of CMS' demand projections, this possibility is very real. Accordingly, because Rogers' phased-in expansion plan would retain a greater degree of flexibility than CMS' proposal to configure its initial system to accommodate its projected fifth year demand, Rogers is entitled to a slight preference.

---

[38] V.H. MacDonald, *The Cellular Concept*, 58 Bell Sys. Tech. J. 15, 19–20 (1979).

[39] MacDonald states: "In principle, the spacing of transmitter sites does not need to be regular, and the cells do not need to have any particular shape." *Id.* at 16.

[40] *Id.* at 19.

[41] *Id.* at 20, 22; Advanced Mobile Phone Service, Developmental System Report No. 9 at A II-5 to A II-7 (filed May 29, 1979). Furthermore, a system designed on an idealized grid will likely be modified during construction as ideally located transmitter sites will often be unavailable.

## IV. *Issue (c)*

44. Issue (c) requires comparison of the nature and extent of services proposed by each applicant, including rates and charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching facilities). In our *Report and Order* we indicated that this issue is not as significant as Issues (a) and (b). 86 FCC 2d at 503. We also stated that, while the adequacy of base station and switching facilities might be an issue in some cases, we did not expect it to be a significant issue in general. Finally, we noted that personnel and practices would be significant "to the extent that they affect an applicant's ability to implement its proposal." *Id.* Judge Fitzpatrick awarded Rogers a slight preference under issue (c) for its maintenance and personnel proposals. These factors were accorded more weight than a slight preference given to CMS for its proposed rate structure.

45. *Proposed Service Offerings*. Both applicants proposed a variety of services in addition to basic telephone service.[42] The judge found that neither applicant had demonstrated demand for the proposed services. He therefore concluded that neither applicant deserved comparative credit for its proposal. CMS contends that its more extensive list of proposed services should be preferred. CMS notes that we have encouraged diversity in service offerings and asserts that its proposal demonstrates sensitivity to consumer convenience. Finally, CMS excepts to the judge's conclusion on this issue because it contends that demand for basic cellular service has not been quantified. It believes that it is impossible to quantify demand for optional features before basic service is available in the market; absent quantification, CMS contends that its proposal is entitled to some weight.

46. We agree with the judge that, absent any showing of potential demand for proposed services, no credit can be given. It is obvious that the same market studies that the applicants used to forecast demand for basic cellular service could also have been used to gather data indicating demand for proposed service features. While CMS correctly notes that we encourage diversity in service offerings, we believe the marketplace will ultimately determine what services are offered. We do not wish to encourage applicants to engage in a bidding war for comparative credit by proposing services that subscribers neither need nor want.

47. *Rates and Charges*. The ALJ gave CMS a slight preference for its proposed rate structure. The judge found several significant

---

[42] The proposed service offerings of both applicants are discussed in paragraphs 30 and 31 of the *I.D.*

differences between the parties on this issue. Rogers proposes to bundle its monthly access fee with a monthly air time allowance.[43] CMS' access fee would include no air time allowance. Rogers would also impose a three minute minimum billing period and proposes only a two-tiered, peak/off-peak billing structure as compared to CMS' three-tiered structure. Finally, CMS proposes to bill its subscribers for the first half-minute of air time and for each tenth of a minute thereafter. The judge declined to give either party credit for its proposed rate levels, asserting that each applicant's analysis of the proposed rates suffered from methodological flaws which made it impossible to determine whether the proposed rates were realistic. CMS, however, argues that its rates would be consistently and substantially lower for the average subscriber than Rogers', and it therefore deserves a preference. Moreover, CMS contends that the judge misapplied *Houston Mobilfone, Inc.*, 65 FCC 2d 848 (Rev Bd. 1977) *review denied*, FCC 78–477 (July 11, 1978) *remanded sub nom. Mobilfone Service Inc. v. FCC*, 605 F.2d 572 (D.C. Cir. 1979); *on remand Houston Mobilfone Inc.*, 78 FCC 2d 1067 (1980).[44]

48. We agree with the judge that CMS' rate structure is to be preferred to Rogers'. CMS' unbundled rate structure, which employs a much shorter billing increment, better serves to promote the Commission's policy favoring usage-sensitive, cost-based pricing.[45] Furthermore its off peak pricing proposal would result in more efficient system usage.[46] A slight preference is therefore warranted.

49. We cannot agree with CMS, however, that it should be granted a preference for its rate levels. The judge found that the applicants' comparative rate analyses suffered from serious methodological shortcomings. The judge also concluded that neither applicant had established the methodology used in formulating its proposed rates. We find that the judge's conclusion that the applicants have failed to demonstrate that their rates are realistic is amply supported by the record. As the Review Board concluded in *Houston Mobilfone*, an applicant's proposed rates may be of decisional significance "where an applicant has made an appropriate showing of the methodology used in the effectuation of its rate proposal". *Houston Mobilfone, Inc.*, 65 FCC 2d at 859. Without such a showing, an applicant's proposal is completely unrealistic. An applicant's proposed rates and charges are always subject to a degree

---

[43] Under Rogers' proposed Option 1 subscribers would pay $30 a month and receive an allowance of 120 "free" minutes. Under Option 2 subscribers would pay $6.50 and receive a nine minute allowance.

[44] In *Houston Mobilfone*, the Review Board held that no preference could be granted for proposing lower rates absent a showing that the proposed rates are realistic.

[45] *See, e.g.*, MTS and WATS Market Structure (Access Charge Order), Order on Reconsideration, FCC 83–356, 48 Fed. Reg. 42987 (released August 22, 1983), at para. 7.

[46] *See e.g.*, AT&T (WATS), 84 FCC 2d 158, 174–78 (1980); AT&T (WATS), 86 FCC 2d 820, 830–54 (1981).

of uncertainty. Because common carrier mobile services, such as cellular service, have been considered essentially intrastate the matter of rates and charges to the public has been left to the states to regulate. *Houston Mobilfone, Inc.*, 65 FCC 2d at 859. Thus, even when an applicant has established its methodology (including the assumptions upon which it has based its expected costs) for establishing its rates, its rates are still suspect because the state utility commission may adjust them. Nevertheless, where an applicant's proposed rates and charges are based upon an established methodology that reasonably anticipates all the applicant's costs, we will consider an applicant's proposed rates. In all other instances, such proposed rates are too unrealistic to warrant our consideration.[47] Accordingly, we affirm the judge's refusal to grant comparative credit for the proposed rate levels.[48]

50. *Maintenance and Personnel.* Rogers received two slight preferences for its maintenance and personnel proposals. In both instances these were the result of demerits given to CMS. The judge concluded that Rogers' personnel plan was superior to CMS' because the record did not indicate whether certain officers of CMS—who are also officers of its corporate parent—would be involved in the day-to-day operation of its Chicago system. Rogers' maintenance plan was preferred because CMS did not specify the size of its technical staff. CMS excepts to these conclusions and contends that its personnel and maintenance proposals are superior to Rogers'.

51. Neither applicant will be awarded a preference in either of these areas. As we stated in our *Report and Order*, "[p]ersonnel and practices will be significant to the extent they affect an applicant's ability to implement its proposal." 86 FCC 2d at 503. We also stated that we did not expect maintenance proposals to present a significant issue in general. *Id.* Neither the reasons stated by the judge for granting Rogers preferences in these areas nor the contrary arguments of CMS persuade us that either applicant merits a preference

---

[47] In this regard, we note that we have considered the applicants' rate structures because those proposals are not based upon an unknown methodology or unavailable cost data. Indeed, the Commission is very familiar with the concepts the applicants utilized in establishing their rate structures. Additionally, unlike rates themselves, rate structures can be proposed and considered without reference to the applicant's actual underlying expenses.

[48] CMS also contends that in this instance the judge should not have applied *Houston Mobilfone*. Citing *Telanserphone Inc.* v. *FCC*, 231 F. 2d 732 (D.C. Cir. 1956), as support, CMS argues that because of the newness of cellular and because the matter of rates and charges was designated for comparative hearing, we are required to consider rate levels. However, as the Review Board noted in *Houston Mobilfone*, that case was decided at a time when relatively few states exercised jurisdiction over such rates and charges, and the primary responsibility for rate regulation fell upon this Commission. Furthermore, as we indicated above, we are willing to consider an applicant's proposed rates when the appropriate information is supplied.

under the above-stated policies. We cannot find that either applicant's personnel proposal will measurably affect its ability to implement its overall proposal. Nor do we find that their maintenance proposals raise a significant issue. Accordingly, no preferences will be granted for either applicant's maintenance and personnel proposals.

52. *Practices*. CMS proposed to invest $100,000 in Chicago to create at least three organizations controlled by minorities and women to engage in retail and service functions with respect to CMS' cellular services. CMS excepts to the conclusion that Commission precedent does not support granting a preference for such a proposal. CMS' proposal, while commendable, does not involve participation by minorities or women in the ownership or operation of the cellular carrier itself. Accordingly, no preference can be considered on the basis of the personnel or practices issues designated.[49]

## V. *Procedural Matters*

53. CMS has filed a motion to reopen the record, seeking an opportunity to rebut certain conclusions in the *I.D.* that it says were based on evidence first submitted on rebuttal. CMS also wishes to address certain issues first raised in the *I.D.* These matters include (a) the finding that CMS would suffer co-channel interference on two of its signalling channels; (b) the finding that CMS' proposed switching capacity would be inadequate in the first year or subsequently; (c) the conclusion that CMS would suffer undue intrasystem interference as the system expands; and (d) the finding that a fundamental principle of cellular design requires that spacing between cells follow as uniform a pattern as possible. With regard to each of these issues we have either overruled the judge or held that, in fairness to CMS, his findings would be accorded no weight. Any prejudice that CMS might have suffered as a result of these rulings has therefore been removed. Accordingly, the motion to reopen the record will be denied.

## VI. *Conclusions*

54. Based on the record before us we have concluded that Rogers is entitled to a slight preference under Issue (a) on account of its superior coverage of area and population, and preferences for its more reliable analysis of demand and its superior ability to accommodate local demand for service. Rogers is also entitled to a slight preference under Issue (b) for its more flexible expansion plan,

---

[49] The Common Carrier Bureau has declined to grant a preference on the basis of minority participation in cellular services. GTE Mobilnet of Tampa, Inc. (Tampa Order), 54 RR 2d 829, 833 at n. 8, released August 10, 1983. An application for review of the Bureau's action is before the Commission. Our decision in that proceeding will have no bearing on the instant proceeding because here there is no proposed minority participation in the licensee itself.

while CMS has received a slight preference under Issue (c) for its proposed rate structure. We therefore conclude that the public interest, convenience and necessity would be best served by the grant of Rogers' application.

55. Accordingly, IT IS ORDERED, That the application of Rogers Radiocall, Inc. (File No. 26040-CL-P-(18)-82) IS GRANTED and the application of Cellular Mobile Systems of Illinois, Inc. (File No. 26181-CL-P-(34)-82) IS DENIED.

56. IT IS FURTHER ORDERED, That the Motion to Reopen the Record and Petition for Leave to Supplement Motion to Reopen the Record filed by Cellular Mobile Systems of Illinois, Inc. ARE DENIED.

57. IT IS FURTHER ORDERED that the grant to Rogers Radiocall, Inc. IS CONDITIONED upon its obtaining the appropriate antenna structure clearances.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

*Commissioners Quello's and Dawson's statements may be seen on Decision in CC Docket No. 82–796, FCC 84–61, published in this pamphlet.

FCC 83D–49

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | CC Docket No. 82–721 |
| ROGERS RADIOCALL, INC. | File No. 26040-CL-P-(18)-82 |
| and | |
| CELLULAR MOBILE SYSTEMS OF ILLINOIS, INC. | File No. 26181-CL-P-(34)-82 |
| For a Construction Permit to establish a cellular system operating on frequency Block A in the Domestic Public Cellular Radio Telecommunications Service to serve the Chicago, Illinois, modified Standard Metropolitan Statistical Area | |

### *Appearances*

*Arthur Blooston* and *Chase Libbey*, on behalf of Rogers Radiocall, Inc.; *Edward P. Taptich* and *Charles C. Hunter*, on behalf of Cellular Mobile Systems of Illinois, Inc.; and *James O. Juntilla* and *Jacob W. Mayer*, on behalf of the Separated Trial Staff, Common Carrier Bureau, Federal Communications Commission

## INITIAL DECISION OF ASSISTANT CHIEF ADMINISTRATIVE LAW JUDGE THOMAS B. FITZPATRICK

(Issued: August 11, 1983; Released: August 17, 1983)

### *Preliminary Statement*

1. This proceeding involves the mutually exclusive applications of Rogers Radiocall, Inc. (Rogers) and Cellular Mobile Systems of Illinois, Inc. (CMS) for authority to construct a cellular system serving the Chicago, Illinois modified Standard Metropolitan Statistical Area (SMSA). By *Memorandum Opinion and Order Granting Application and Designating Applications for Hearing*, 91 FCC 2d 512 (1982), the Commission designated the applications for hearing on the following issues:[1]

---

[1] The Commission also granted the non-wireline application of Advanced Mobile Phone Service, Inc. for Authority to construct a cellular system serving the Chicago SMSA on a separate frequency block. The Commission provided that any grant to CMS should be conditioned upon the possible reexamination or

(a) To determine on a comparative basis the geographic area and population that each applicant proposes to serve; to determine and compare the relative demand for the services proposed in said areas; and to determine and compare the ability of each applicant's cellular system to accommodate the anticipated demand for both local and roamer service;

(b) To determine on a comparative basis each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed Cellular Geographic Service Area (CGSA) in order to meet anticipated increasing demand for local and roamer service;

(c) To determine on a comparative basis the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities); and

(d) To determine, in light of the evidence adduced under the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience and necessity.

2. Pursuant to the special procedures governing cellular radio applications in the top 30 markets[2], Rogers and CMS filed their written direct cases with their applications on June 7, 1982. Written rebuttal cases were filed December 27, 1982. An evidentiary admissions session was held February 17, 1983 at the Offices of the Commission. Evidentiary hearings to permit cross-examination of three of the applicants' witnesses were held April 11 to April 13, 1983. At the conclusion of those hearings, the Presiding Judge closed the record. Proposed Findings of Fact and Conclusions of Law were filed by all parties on May 16, 1983; Reply Findings and Conclusions were filed ten days later.

## *Findings of Fact*

### I. *The Applicants*

### (a) *Rogers*

3. Rogers, an Illinois corporation, is wholly-owned by Rogers Radio Communications Services, Inc. (RRCS) and Metromedia, Inc. (Metromedia), each of which holds a 50% interest in the applicant. Since this proceeding was designated for hearing Metromedia has acquired RRCS, and, as a result, control of Rogers is now entirely in Metromedia's hands.[3] RRCS, the largest radio common carrier in Illinois, is engaged exclusively in common carrier communication

---

reconsideration of that applicant's qualifications as a result of whatever decision is reached in *A.S.D. Answer Service, Inc.*, 47 Fed. Reg. 40230, published September 13, 1982.

[2] *Cellular Communications Systems*, 89 FCC 2d 58, 87–91 (1982)

[3] *Beep Communications Systems, Inc.*, (FCC 82T-26, Telecommunications Committee), 52 RR 2d 922 (1982), and Rogers Direct Case Exhibit 36. Despite the transfer of control of RRCS to Metromedia, the stock ownership of Rogers has not changed, and RRCS continues to exist as a separate corporate entity. Moreover, Metromedia has no intention of changing the personnel and practices of RRCS. (Rogers Direct Case Exhibit 37)

and has licenses in the Domestic Public Land Mobile Radio Service (DPLMRS), providing pocket pager and conventional mobile telephone service. Metromedia is a diversified communications corporation engaged in broadcasting, advertising and entertainment. (Rogers Direct Case Exhibit 3, pp. 1–4, 40, 42, 64, 72)

(b) *CMS*

4. CMS is an Illinois corporation organized for the purpose of implementing a cellular mobile communications system in the Chicago SMSA. CMS is a wholly owned subsidiary of Cellular Mobile Systems, Inc. (Systems) which, in turn, is wholly owned by Graphic Scanning Corporation, a telecommunications service corporation which directly and through subsidiaries offers a variety of specialized data and message processing and communications services. (CMS Direct Case Exhibit I, pp. 1–7)

## II. *Issue (a)*

### A. *Georgraphic Area and Population*[4]

5. The Chicago, Illinois modified SMSA, composed of six counties (Cook, DuPage, Kane, Lake, McHenry and Will), encompasses a total land area of 3,724 square miles, and has a population of 7,103,624.[5] Rogers' CGSA covers the entire SMSA, while CMS' covers 3,416 square miles, or 93.3%. Neither of the applicants, however, proposes to serve the entire SMSA. Rogers' composite 39 dBu contours within the SMSA cover 3,213 square miles, or 86.3% of the SMSA, and 7,005,000 persons, or 98.6% of the SMSA population. CMS' composite 39 dBu contours within the SMSA encompass 3,086 square miles, or 82.9% of the SMSA, containing 6,947,000, or 97.8% of the SMSA population. (CMS Rebuttal Exhibit I, pp. 2–3; Rogers Rebuttal Exhibit 14, p. 4)[6]

6. The 39 dBu contours of each applicant encompass five discrete areas, or "pockets", not covered by the other. Rogers' coverage excludes areas on the far north border of the SMSA, near Fox Lake; the far western border of the SMSA, near Lily Lake; south of where the Kane and Kendall county borders coincide; near the southern

---

[4] For purposes of comparison, the geographic area that an applicant proposes to serve includes that area within the proposed 39 dBu contours which, in turn, falls within the proposed CGSA and the relevant SMSA. *Designation Order, supra* at 520, n. 20.

[5] U.S. Department of Commerce, Bureau of the Census, *State and Metropolitan Area Data Book 1982*, at 46. For computational purposes, the population of the SMSA has been rounded off to 7,104,000.

[6] The figures for CMS reflect an erratum to its rebuttal filed March 18, 1983, which in turn reflects a January 18, 1983 amendment to its application. Although Rogers claims that CMS' geographic area should be lower (3,043 square miles) and its population larger (6,959,647), CMS' own figures will be accepted since Rogers' calculations do not take into account the consequences of CMS' January 18, 1983 amendment.

extremity of the SMSA, just north of the Will County border; and the eastern border of the SMSA, due east of Calumet City. These areas, which are primarily agricultural, contain a population of 67,484, and by Rogers' estimation, will generate 42 projected users. CMS' coverage excludes areas on the far northwest corner of the SMSA, encompassing the city of Harvard; the northwest corner of the SMSA, approximately at the McHenry/Lake county border just west of Aurora, at the Kane/Kendall county border; the southwest corner of the SMSA, just west of Joliet; and the southwest corner of SMSA, near Chicago Heights. These areas primarily contain municipal service areas and rural centers, have a population of 111,781, and are estimated to generate 72 projected users. (Rogers Rebuttal Exhibit 15, pp. 4–5, 12–13)[7] The discrete areas served by Rogers are exclusively more densely populated, contain more special user concentration, such as significant traffic interchanges, and, therefore, are expected to generate more users than the "pocket" served by CMS.

7. CMS also urges the Presiding Judge to compare the two applicants on the basis of their respective "depth" of coverage, *i.e.*, the number and reach of overlapping cells incorporated into a particular system design. According to J. Douglas Wells (Wells), its Vice President for Technical Services, coverage depth serves to enhance the quality and reliability of cellular service since overlapping cells provide potential multiple paths for subscribers to access the system from a given location. It is also claimed that depth of coverage "allows for greater flexibility in accommodating occasional, but substantial, increases in demand" by allowing capacity in multiple cells to be shifted to the overlap area. (CMS Findings, para. 33) Finally, Wells maintained that overlapping coverage allows for enhanced services in areas that are characterized by dense concentrations of large buildings. (CMS Direct Case Exhibit IV, p. 1; CMS Rebuttal Exhibit I, pp. 1–2, 4–5; TR 531, 532)

8. With its proposed 34 cell system, CMS will provide greater depth of coverage than Rogers in its first year of operation, serving over 2,400 square miles of the Chicago SMSA with two or more cells; in excess of 12,500 square miles with three or more cells; and approximately 950 square miles with four or more cells. By contrast, Rogers will cover 1994 square miles (or approximately 20% less area) with two or more cells, 823 square miles (or 50% less area) with three or more cells; and 279 square miles (or 70% less area) with four

---

[7] The above figures are not disputed by CMS. The pockets proposed by Rogers will cover one hospital, an army ammunitions plant, and sections of Interstate highways 30, 55 and 80, U.S. Route 52, and local routes 83 and 394.

or more cells. (CMS Rebuttal Exhibit I, p. 6, as reflected in the March 18, 1983 erratum, *supra.*)[8]

### B. *Relative Demand for Service*

9. Each of the applicants conducted studies to determine relative demand for cellular radio service. Based on their research, the applicants forecast demand as follows:

| *Year of Operation* | *Rogers*[9] | *CMS*[10] |
|---|---|---|
| 1 | 7,120 | 4,802 |
| 2 | 9,560 | 11,214 |
| 3 | 12,331 | 19,188 |
| 4 | 17,881 | 25,585 |
| 5 | 25,618 | 31,959 |
| 6 | 31,921 | None |
| 7 | 38,575 | None |
| 8 | 44,698 | None |
| 9 | 50,145 | None |
| 10 | 54,923 | None |
| 11 | 58,573 | None |

#### (a) *Rogers' Demand Forecast*

10. Rogers' demand forecast is based on a market study performed by Compucon, Inc., an engineering and marketing firm. The major objectives of the study were to identify high potential cellular users and the geographical boundaries that were likely to contain large concentrations of them, both for the near (1985) and far (1996) term; to forecast the number of cellular units that are expected to be in service from 1985 to 1995; and to distribute the number of units expected to be in service through the market area. In support of this study effort, a public demand survey of potential business customers for cellular radio was conducted by Walker Research Corp. The results of this survey were then used by Compucon in conjunctin with a demand forecast model to project the actual number of individual mobile units that Rogers could expect to serve. (Rogers Direct Case Exhibit 11, pp. 14, 53, 92–99)

11. The Walker survey was based on 469 interviews of businesses randomly selected in the Chicago SMSA.[11] On the basis of this

---

[8] In accordance with the Presiding Judge's oral ruling of April 11, 1983, CMS has not been credited with the larger figures contained in this exhibit, as corrected.

[9] The figures in the Rogers column represent Rogers' share of the estimated number of units in service in the total Chicago market area under an "expected" scenario. See *infra*. Rogers has assumed that 1985 will be its first year of operation. (Rogers Direct Case Exhibit 11, p. 49)

[10] In Exhibit II, p. 14 of its direct case, CMS states that 31,959 units represent "the total market need for Chicago cellular telephones." It appears from a Table appearing on Exhibit IV, p. 14 of its direct case, however, that this figure is a fifth year projection. CMS does not indicate when it anticipated its proposed service would commence operation.

survey, Walker determined that 41% of all respondents were "somewhat" or "very" interested in cellular service at an unspecified "reasonable price"; that demand for cellular service fluctuated with price; and that the average number of units respondents were interested in acquiring was price sensitive. (Rogers Direct Case Exhibit 11, pp. 21, 86, 90, 91)[12]

12. From the results of the Walker survey, Compucon forecast the need for cellular radio in the Chicago SMSA. Numerous variables, such as the rate of business growth, cost of service and equipment, average number of units each subscriber would desire, penetration of market demand, and market share were considered in arriving at these projections. By changing these variables, three different "scenarios"- expected, optimistic, and pessimistic - were established to project the aggregate demand for units in any given year. The "expected" need for Rogers' cellular units in 1985–7,120 - assumes a business growth rate of 0.7%, a lease cost of $150 per month, 3.9 units per customer, a 15% penetration rate, and a 40% market share for Rogers. Rogers' 1995 "expected" demand projection of 58,573 assumes the same business growth rate and market share, but is based on a lower lease cost ($100), a higher estimation of units per customer (4.5), and a higher penetration rate (90%). (Rogers Direct Case Exhibit 11, pp. 57–59, 92–100)

13. To determine where demand for cellular service can be anticipated, Compucon then developed high potential area profiles for the Chicago SMSA in 1985 and 1995. To accomplish this task, Compucon first collected data on a census tract level on a number of demographic variables considered to be key indicators of cellular demand, such as construction activity (including commerical, industrial and office space), high income residential development, heavy traffic flow, and major planned thoroughfares. This data was converted to densities, where appropriate, collected in a variety of forms, including maps, and high potential area boundaries were drawn to encircle the substantial potential user concentrations in the total SMSA. Compucon then determined demand for cellular service within the high potential area by weighing a number of key variables, such as the number of businesses, residential population, and household income, and ranking each census tract on a scale of 1 to 12. On the basis of this analysis, Compucon distributed its

---

[11] Compucon assumed that the potential users of Rogers' cellular service would, at least initially be businesses, as opposed to individual residents. This assumption is based on the composition of current mobile telephone and pager users, and on the fact that cellular service will initially be relatively expensive. The random sample used by Walker was provided by Dun's Marketing Services, a subsidiary of Dun & Bradstreet, and includes all business establishments, government offices, institutions and non-profit organizations. (Rogers Direct Case Exhibit 11, pp. 19, 53–55)

[12] The Walker survey identified Rogers' proposed service and service area, and questioned respondents as to interest in service at different costs, usage patterns, and other factors. (Rogers Direct Case Exhibit 11, Appendix D)

forecasted units for 1985 and 1995 throughout the SMSA to each census tract. (Rogers Direct Case Exhibit 11, pp. 25, 50, 64, 66–84, 101–103)

14. Rogers also conducted a survey of current RRCS customers, sending out 9,238 inquiries by mail and receiving 1,284 responses. These inquiries quoted estimated costs of service and described the new area of service. In response to the survey, Rogers received requests for 4,326 units, including 1,532 portable units, 1,793 mobile units, and 1,001 dispatch units. (Rogers Direct Case Exhibit 10, p. 6)

### (b) *CMS's Demand Forecast*

15. On behalf of CMS and its cellular affiliates, Graphic Scanning commissioned a number of market research studies in an effort to forecast demand for cellular service in the Chicago SMSA. Graphic's research is based on the premise that paging service is the closest product precursor of cellular radio and that the primary initial users of cellular radio will be business and service establishments. To determine the need for cellular service in the Chicago SMSA, CMS submitted two telephone surveys, one of the general population of Chicago and the other of Chicago paging customers; two mail surveys, one of the general population of Chicago and the other of Chicago paging customers; the Claritas Corporation (Claritas) survey and the Westat Study. CMS acknowledges, in its Findings (para. 41), that the actual level of demand projected was based "primarily" on the studies conducted by Claritas and Westat. These six studies are (CMS Direct Case Exhibit II, pp. 5, 12):

(1) *The Claritas Survey.* This study, conducted by Claritas, a market research firm, was designed to estimate demand for cellular service by analysis of pager penetration rates in certain markets in which Graphic Scanning, CMS' parent, offers paging services. (CMS Direct Case Volume 2, Section I) Claritas based its projections on observed sales records showing sales made in 4 or 6[13] unnamed markets and for customers characterized as "representative." This data, comprising a nationwide sample of 5,541 accounts, was supplied by another Graphic Scanning affiliate. Claritas coded the sample by standard industrial classification (SIC) code and projected demand for paging services. The assumptions of this study are that the penetration of the affiliate into the SIC codes is representative of the paging industry; that the sample was properly drawn and reflects the affiliate's penetrations; and that the markets studied are representative of the remaining areas of the country. The Claritas study projects 23,470 "accounts" and 67,155 pagers for the Chicago SMSA.

(2) *Graphic Scanning Telephone Survey of General Population.* Graphic selected 151 Chicago SMSA business establishments from an unidentified sample frame, and completed 74 interviews. Respondents were questioned as to their interest in service in June 1983 at specific monthly costs, the number of units they might purchase, and other factors. Actual frequencies and percentages observed were then enlarged by a factor representative of the difference in

---

[13] The actual number of markets sampled is not clear; Page 2 of Volume 2, Section I suggests that 6 markets were sampled, while Page 3 suggests that only 4 were sampled.

the sample size and the size of the actual population. When adjusted for nonresponse, the Graphic survey indicates that 16,810 business establishments would use cellular radio in June 1983, if available, at a monthly cost of $110; 12,578 at $130; and 12,578 at $150. (CMS Direct Volume 2, Section II, pp. 1–5, Table 3–6A)[14]

(3) *Graphic Scanning Telephone Survey of Paging Customers.* Graphic selected 142 businesses in the Chicago area which are customers of its paging service, and completed 97 interviews. Respondents were questioned as to the same matters raised in the telephone survey of the general population and, as with that other survey, actual frequencies of responses were enlarged. According to this survey, when results are adjusted for nonresponse, 2,498 establishments would use cellular units in June 1983, if available at a cost of $110 per month; 2,047 at up to $130; and 1,842 at up to $150. (CMS Direct Case Volume 2, Section III, pp. 1–5, and Table 3–4A)[15]

(4) *Graphic Scanning Mail Survey of General Populations.* For this survey, Graphic mailed questionnaires to 1,210 businesses in the Chicago SMSA drawn from the 15 most pager oriented SIC codes, as determined by Claritas, and received 127 (10.5%) responses. All those who did not return the questionnaire were considered a "no" response to the question of need for cellular service. Of those questionnaires returned, 78% came from respondents who indicated that they would consider subscribing for cellular service. When adjusted for nonresponse, however, this figure dropped to only 8.2%. The survey shows no significant difference between preference for mobile over portable service; a willingness to pay $52–54 per month for service if units are purchased, and $85–87 per month if units are leased. Respondents were also questioned as to which areas of the city they expected to use cellular units, and at what time of day. (CMS Direct Case Volume 2, Section IV, pp. 1–6)[16]

(5) *Graphic Scanning Mail Survey of Paging Customers.* Using the same methodology as for its other mail survey, Graphic sent out 1,084 questionnaires to its paging customers, and received 107 responses (15.6%). This survey shows 91.6% of all respondents indicating they would consider cellular service, 14.3% when adjusted for nonresponse. The survey also indicates that there is a significant preference for portable over mobile service; and that the mean amount respondents would be willing to pay monthly for cellular service is $47–48 if units are purchased, and $83 if units are leased. (CMS Direct Case Volume 2, Section V)

(6) *The Westat Survey - Area Profile and Cellular Mobile Telephone Market Survey.* This survey is divided into three parts. (CMS Direct Case Volume 3) The first section is a demographic profile of the Chicago SMSA and its component counties, and includes information on the ethnicity of the area population, rate of growth, household income, age, education and housing.

---

[14] When unadjusted for nonresponse, these figures are 11,807; 8,281; and 8,281, respectively. (Table 3–6B)

[15] When unadjusted for nonresponse, these figures are 1,720; 1,419; and 1,277, respectively. (Table 3–4B)

[16] The 15 SIC codes are: health services; special trade contractors, electric and electronic equipment; business services; personal services; real estate; trucking and warehousing; automotive dealers or service stations; auto repair services and garages; building materials or garden supplies; food and kindred products; instruments and related products; furniture and home furnishings; electric, gas and sanitary services; and communications. (CMS Direct Case Volume 2, Section IV, p. 1)

Computer generated density maps were also prepared, showing the geographic distribution of households, households with incomes of $50,000 or more, and private employment in the SMSA. The second section of the Westat survey describes vehicular traffic patterns and key metropolitan facilities and includes a map showing traffic volume in the SMSA and projections of population and business growth by the year 2000.

Additionally, Westat conducted a telephone survey of private business establishments in the top 30 SMSAs. This resulted in 2,251 completed interviews, of which 80 were in Chicago. In order to derive gross estimates of market demand in Chicago, Westat employed a "synthetic estimate" procedure in which the data for all top 30 SMSAs were combined and a weight of .3 was assigned to the relevant Chicago market area. The Westat survey, when adjusted for nonresponse, estimates a need for 95,400 mobile units and 86,900 portable units during the first five years of service in Chicago at a monthly cost of $110 among establishments reporting likely or probable cellular use. (CMS Direct Case Volume 3, Chapter 3, pp. 3–1 through 3–6, and Table 3–1A)[17]

16. Based on the above analyses, CMS witness Roger Paradis maintained that Graphic Scanning was able to both categorize major SMSAs according to their relative need for personal communication services, and to measure the projection of absolute need required within each CGSA. Without describing his calculations or operating assumptions, or those of Graphic Scanning, he concluded that Chicago, along with 8 other major SMSAs, has a projected need of .0045 cellular units per 1,000 population. Based on the 1980 census population count, the total market need for Chicago cellular telephones is estimated to be 31,959 units for CMS' fifth year of operation. (CMS Direct Case Exhibit II, pp. 14–16) CMS' first year demand projection of 4,802 units was calculated by a formula used in other CMS markets, multiplying the fifth year projection by a factor of 15%. (TR 429–431) Paradis explained that Graphic Scanning used maps showing densities of total households for the SMSA, densities of households with incomes of $50,000 or more, traffic pattern information and concentration of place of employment and places of pedestrian gatherings to project models of cellular system usage. However, no more specific information was given on how these models were developed. (CMS Direct Case Exhibit II, p. 5)[18]

### (c) *Ability to Accommodate Anticipated Demand for Local Service*

17. In its initial year of operation, Rogers proposes an 18 cell system which will be configured with omnidirectional antennas and be equipped with an Anaconda-Ericsson AXE 10 Switch and SRA 900 Base Station equipment. (Rogers Direct Case Exhibit 1, pp. 55, 157,

---

[17] When not adjusted for nonresponse, these figures are 75,000 and 68,500, respectively. (Table 3–1b)

[18] The maps to which Paradis refers are those attached to the end of Volume 3 of CMS' direct case.

158; Direct Case Exhibit 8, p. 11) According to Robert Roenitz, Rogers' consulting engineer, the Ericsson switch can be equipped to serve 250,000 subscribers and has a port capacity of 65,000 ports. (Rogers Rebuttal Exhibit 29, p. 11)[19] For its first year system, Rogers also proposes to use 351 voice and 18 signalling channels. These channels are designed to provide subscribers with a P0.01 grade of service, based on the Poissant traffic formula and premised on the assumptions that each call will have a 101 seconds holding time (0.028 Erlang) and that each subscriber will place 1.0 calls per hour. As detailed, *infra*, in subsequent years Rogers' system will evolve into cell-splitting, sectorization, and a P0.02 grade of service. (Rogers Direct Case Exhibit 1, pp. 26, 144, 152; Direct Case Exhibit 36, p. 9; Rebuttal Exhibit 17, pp. 2, 4)[20]

18. Compucon, which conducted Rogers' market research, designed its system as well. Roenitz, Rogers consulting engineer and Manager of Cellular Systems for Compucon, explained that, in its system design, Compucon's engineering was responsive to the input of the market study forecasts of user densities by census tract, and to ten year projections of population growth and shifts in community development. These forecasts, he asserted, were instrumental in the initial placement of a cellular grid over the community to be served for the initial selection of cell sites, in sizing the cellular system, in evaluating channel requirements, and in developing Rogers' expansion plan. (Rogers Direct Case Exhibit 1, pp. 12–14)[21] Describing the

---

[19] In its Proposed Findings, CMS contends that Rogers will not equip its system with a directed retry function, which enables a user to have access to an overlap cell if his equipment has not selected the signalling channel from that cell. This claim is rejected. Although Rogers did not identify the directed retry function specifically in its direct case, it did state that its equipment was fully compatible with Commission standards. (Rogers Exhibit 1, p. 55) As published in the Commission's *Report and Order on Cellular Communications Systems*, 86 FCC 2d 469, 622 (1982), the Communications equipment standards include the provision of directed retry. Thus, all compliant cellular equipment includes this feature.

[20] Grade of service can be defined as the probability that a telephone call will not be completed because all voice channels are busy during a period of peak traffic. It is the ratio of uncompleted calls to attempted calls in a one hour period. A grade of service of 0.01 therefore signifies that, for every 100 calls attempted in a one hour period, no more than one will not be completed. The Poissant formula assumes that a caller will continue to retry if he receives a busy signal.

Cells which are sectorized employ multiple directional antennas, each serving a particular portion, or sector, of the cell. Channels allocated to the cell are divided among the sectors. Thus, subscribers in a sectorized cell have available for their use the channels that are assigned to the sector they are in. Omnidirectional cells employ a single antenna and have all channels available to all subscribers in the service area.

[21] The geographical layout of small cells in the initial system was also based upon the constraints of establishing a repeatable reuse pattern for system expansion while accounting for the constraints of radio propagation and the density of traffic at the cell level and throughout the system. Rogers cells appear to be located as close as possible to points on an expansion grid. However, some

methodology employed to determine the channel requirements in individual cells, Roenitz further explained that Rogers' 39 dBu contours were interfaced via computer to determine which census tracts fell within which cell (or cells). Then, marketing information showing the number of users per census tract was fed into the computer program to determine the number of users per cell. Finally, Compucon determined how many channels per cell were required to serve the projected number of users in each cell under a specific grade of service. (TR 214–216; Rogers' Direct Case Exhibit 1, pp. 20–25)[22]

19. The system design approach which CMS has adopted differs from that of Rogers in several respects. In the opinion of CMS' engineer, J. Douglas Wells, a five year expansion period is an appropriate focus in the cellular environment. (CMS Direct Case Exhibit IV(a), p. 6) Proceeding from that assumption, CMS has configured its system physically to accommodate its fifth year demand forecast. (CMS Direct Case Exhibit IV(a), pp. 3, 6; CMS Direct Case Exhibit IV, p. 2) The 34 cell omnidirectional system proposed for its first year of operation, CMS claims, will require no new cells or cell relocation during the first five years of service. (CMS Direct Case Exhibit IV(a), pp. 3, 8; TR 443–444) Other equipment in the CMS system, however, including switching and base site facilities, will be installed as it is needed. Thus, CMS proposes to install a Motorola EMX 250 switch during its first year of operation, expand through modular growth into a "500" configuration (tentatively scheduled for the second year of system operation), and thereafter add a second EMX 500 switch (tentatively scheduled for introduction in the third operational year) (TR 458–462; CMS Direct Case Exhibit IV(a), pp. 11–12)[23] CMS will also equip its initial system with 301 voice and 34 signalling channels, designed to provide subscribers with a 0.01 grade of service based on the Erlang B traffic formula and premised on the assumption that each call will have a

---

variation from an idealized matrix occurs, and is inevitable, due to irregularities of terrain and the realities of land use and availability. As a result, the selection of cell sites does vary from an idealized matrix. (Rogers Direct Case Exhibit 1, p. 121)

Rogers' 39 dBu contours appear to cover most of the area encompassed by Compucon's high potential area boundaries for 1985 and 1995. Compare Direct Case Exhibit 1, p. 70 to Direct Case Exhibit 11, pp. 51, 52. However, nowhere in the record does there appear to be a breakdown of users per census tract or cell in Rogers' system.

[22] Rogers' breakdown of channel requirements per cell for its first year system appears on page 158 of Exhibit 1.

[23] CMS will use base station equipment manufactured by Motorola, E.F. Johnson, and Graphic Scanning. (CMS Direct Case Exhibit IV(a), pp. 3–4)

94 second holding time (0.026 Erlang). (CMS Direct Case Exhibit III, p. 17; Exhibit IV, pp. 13, 16; and Exhibit IV(a), p. 4)[24] As noted, *infra*, additional channels are projected for subsequent years, and CMS has premised these projections, beginning with its fourth year of service, on a 0.05 grade of service. (CMS Direct Case Exhibits IV, pp. 13, 15, 16)[25] According to Motorola, the EMX-250 switch is intended to control systems having an initial capacity less than 250 radio channels. (Rogers Exhibit 36A) CMS' switch for its initial system, therefore, lacks sufficient capacity to serve the number of voice channels (301) proposed.[26]

20. As noted, *supra*, in its Direct Case CMS' market research consultant, Paradis, claimed that Graphic Scanning used maps showing densities of total households for the Chicago SMSA, densities of high income households and other information to project models of cellular system usage. A comparison of these materials with a map of CMS' proposed geographic area reveals, in fact, that most of the areas referenced by Paradis are encompassed by CMS' system.[27] However, nowhere does Paradis nor any other CMS witness state how these demographic materials related to a specific user distribution for the Chicago area. Indeed, CMS' engineer, Wells, essentially conceded that CMS' market surveys were not used to determine where users would be located. The following colloquy demonstrates this (TR 438–440):

> Witness: . . . we admittedly asumed the traffic distribution . . . For instance, in Chicago, it has been assumed that around the loop area, within a few miles of the radium there, you would have maximum traffic. Then going out from that area, you would have an area of lower activity, and then on out past that, you would still have lower activity, as you got into the fringes of the system . . .
>
> Judge Fitzpatrick: Was the distribution of users based on an analysis of Chicago users in this case here?

---

[24] The Erlang B formula assumes that a call that cannot be served immediately is instantly cleared from the system and does not recall. (Rogers Exhibit 17, p. 4)

[25] The result of adopting the Erlang B formula is that to provide the same grade of service as under the Poissant formula used by Rogers, CMS will employ fewer channels. A system with a .01 grade of service will require more channels to serve the same number of users under the Poissant assumptions of caller behavior than the Erlang B assumptions. Assuming 70 Erlang of traffic, a P.01 system would require 88 channels, a B.01 system would require 85 channels, and a B.05 system would require only 75 channels. (Rogers Rebuttal Exhibit 17, p. 3) Thus, Rogers' system, both in its initial design and in subsequent years, will always provide more channels to serve the same amount of traffic than would CMS, resulting in a superior grade of service.

[26] Although CMS' engineer testified that the EMX-250 would provide up to 350 voice channels (TR 582), the description by the equipment manufacturer of its own equipment has been given greater weight.

[27] Compare maps attached to end of CMS Direct Case Volume 3 to CMS Rebuttal Exhibit 1, Appendix 1.

Witness: In this case? No sir. This was our standard design model.

Judge Fitzpatrick: So you applied the standard design model for this case into your other cases?

Witness: Yes, I did.

Consistent with this approach, CMS adopted a semi-uniform channel distribution methodology: Of 34 proposed cells, seventeen are allocated 12 voice channels in the first year and fourteen are allocated 5 voice channels. The remaining three cells are allocated 11, 9 and 7 voice channels respectively. (TR 436–437; CMS Direct Case Exhibit IV, p. 15) CMS' distribution of users per cell follows a similar pattern, despite the wide variance in population among cells using the same number of channels. (CMS Direct Case Exhibit IV, p. 14) Even considering overlap, CMS' cells serve widely varying populations. For example, CMS Cell #1 serves 561,597 persons, whereas Cell #16 services 104,749 persons, yet both cells are allocated 12 voice channels. (Rogers Rebuttal Exhibit 16, pp. 4 n. 2, 7, 9) In light of these circumstances, CMS' claim that it accounts for varying user densities is empirically unsupported.[28]

21. CMS' system will also suffer from co-channel interference during its first year of operation. Specifically, the 39 dBu contours of CMS Sites 4 and 20 overlap. (CMS Rebuttal Exhibit I, Appendix 1) The sites also share a common signalling channel, number 326. (CMS Exhibit IV, pp. 17, 19) It is axiomatic that overlapping areas cannot use the same frequencies. Thus, some of the service area of each cell will suffer interference on the signalling frequencies, as acknowledged by CMS in its Exhibit 110. This exhibit depicts a large area immediately to the north and the west of the Loop area that will suffer signalling channel interference to Cells 4 and 20. Moreover, according to CMS' engineer, loss of a signalling channel incapacitates all the voice channels within a cell in that calls cannot be originated in either direction via a cell that cannot make use of its signalling channel. (CMS Rebuttal Exhibit I, p. 49) Since the grade of service is a function of whether or not a call may be originated, this signalling channel interference will degrade service to this area of CMS' system.

---

[28] As noted, CMS projects its number of users strictly as a percentage of the total population of Chicago. (CMS Direct Case Exhibit II, p. 14) A correlation between assigned channels and population per cell in CMS' system should, but does not, exist.

Rogers argues that CMS has allocated an insufficient number of channels to each cell. This argument is rejected. Rogers has supplied its own distribution methodology and fails to account for the channels supplied by overlapping cells in CMS' system.

(d) *Ability to Accommodate Anticipated Demand for Roamer Service*

22. Rogers will provide basic telephone services to any subscriber, provided that he registers his intentions to roam, in advance, with Rogers' business office. According to Rogers, this can be accomplished virtually immediately after the subscriber places an ordinary telephone call to the Rogers business office requesting temporary registration. Under these circumstances, a roamer will be assigned a new temporary directory number for a specified period of time and can freely place calls during that time frame. A roaming subscriber will also be able to receive calls - either through an operator, or via activation of "call forwarding" from his home directory number to his new, temporary directory number assignment. (Rogers Exhibit 9, pp. 2–3)[29]

23. A foreign subscriber would be registered in CMS' Chicago system under the local number assigned to him in his home system. When a local Chicago caller wished to contact the roamer, he would first dial a single, unchanging access number and, upon receipt of a second dial tone, dial the foreign subscriber's home system number. In this manner, a foreign subscriber who visited Chicago frequently could always be reached by the same access number and his own mobile or portable number. Anyone who knew the subscriber would be in the Chicago area would, therefore, know in advance the number at which he could be reached. (CMS Direct Case Exhibits III, p. 11; Exhibit VI, p. 4; CMS Rebuttal Exhibit I, pp. 51–52)

III. *Issue (b) - Ability to Meet Anticipated Increasing Demand*

24. As noted, both Rogers and CMS claim to have based their system designs on their respective market research studies. Rogers' ten year demand projections are based on Compucon's demand survey and certain assumptions regarding, *inter alia*, business growth in Chicago, the cost of leasing cellular units, and Rogers' share of the Chicago cellular market. CMS' market research projects cellular demand for a five year period and employs the same growth rate in Chicago that CMS has used in other markets where it seeks cellular authorization. (TR 428–433)

25. Rogers' initial 18 cell system, which assumes commencement of operation in 1985, will be usable until 1986, when it is anticipated that cell-splitting will be required. (Rogers Direct Case Exhibit 1, p.161) The first level cell split is expected to occur between 1986 and 1989, and will result in a 49 cell system using 2099 voice channels and, with three exceptions, sectorized antennas. (Rogers Direct Case Exhibit 1, pp. 162–165)[30] A second level cell split will occur between

---

[29] Call forwarding allows individual subscribers to redirect calls intended for their unit to another telephone number. (Rogers Exhibit 9, p. 3)

1990 and 1993. (Rogers Direct Case Exhibit 1, pp. 166–169) To implement cell division, Rogers will employ a 7 cell reuse pattern in which available channels are divided into 21 groups and 44 to 45 voice channels are assigned to each cell. (Rogers Direct Case Exhibit I, pp. 137, 156, 161)[31]

26. After its first year of service, Rogers' design grade of service will be P.02. The basis for determining when sufficient congestion is encountered to warrant channel additions or cell splitting occurs when the measured performance of the cell with the heaviest traffic loading consistently approaches a grade of service of P.05. The action to be taken will consist of modifying RF channel density to correspond to the user density which it serves. Cell splitting will occur when this need to modify RF channel density requires frequency reuse through cell subdivision because the existing system can no longer add or borrow channels to meet the service objectives. In the actual system operation, system software will generate user statistics by cell and for the overall system to provide a data base for

---

[30] CMS' contention that Rogers' expanded system channel capacity and per-cell channel allocation are missing from the record are rejected. The number of voice channels in the Rogers' system at the end of its first level cell split can be determined by reference to pages 156, 162 and 163–165 of Rogers Exhibit 1. Page 162 shows there will be 49 cells under Rogers' first level split. Pages 163–165 show that 46 of these cells will be assigned three frequency groups (Cells 14 and 18 will require only two frequency groups each. Cell 16 will be assigned one group). Page 156 shows that each frequency group is assigned 15 voice channels, except groups 19, 20 and 21, which have 14 channels each. Thus, each cell is assigned 44 or 45 voice channels. Assuming, for ease of computation, cells are assigned 44 channels, the total number of channels assigned in Rogers' system under the first level split is 2024 (46 cells x 44 channels), plus the channels assigned to Cells 14, 16 and 18 (five 15 channel groups, or 75 channels), for a total number of 2099 voice channels. Rogers Exhibit I, Table IV-A reflects the frequency group assignments per cell during Rogers first level cell split and Table I-B reflects the channels assigned to each frequency group. Rogers will assign specific channels from its channel allocation as needed.

[31] As noted, *supra*, Rogers will initiate service with a 24 group, omnidirectional frequency plan. Its switch to a 21 group sectored frequency plan will require some amount of returning so that certain transmitters in each cell will be assigned new frequencies. (TR 220) Although CMS seeks to portray this process of retuning as a major flaw in Rogers' expansion plan (CMS Proposed Findings, paras. 103, 104), the record does not support this position. According to Rogers' engineer, retuning a transmitter on Anaconda-Ericsson equipment is a simple matter involving a keyboard command from the central switch. It can be accomplished in "milliseconds" and does not require manual adjustment of the transmitter. (TR 360, 361, 369–371)

According to CMS, the Rogers 7 cell reuse plan has a maximum capability of 7.0, which CMS calculates by dividing the number of cells in Rogers' system after its first cell split (49) by 7. A more accurate method of determining frequency reuse capability, however, would be to divide the number of voice channels proposed to be used by the number of voice channels available in the spectrum (312). This method would yield the average number of times a given channel will be reused in the system. According to this method, the frequency reuse ratio in Rogers' system after its first level split would be 2099 divided by 312, or 6.72.

the management of the system grade of service. The operating data collected by the system for the ongoing evaluation of the grade of service will include: (a) call attempts/user; (b) call holding time; (c) user distribution in the system at average and peak hours; and (d) marginal call attempts by users trying to obtain maximum range. With these operating statistics, the response to increasing user densities will be to relieve congestion while maintaining the grade of service limits. (Rogers Direct Case Exhibit 1, pp. 144–145)

27. As noted, *supra*, CMS has configured its system physically to accommodate its fifth year demand forecast. Consistent with this approach, CMS' engineer explained that the system's initial 34 cells will not require relocation to accommodate increasing demand, and no additional cells will be required during the first five years of system operation. (CMS Direct Case Exhibits IV, pp. 14–19; Exhibit IV(a), pp. 3, 8; TR 128, 443–444, 446) By its fifth year of operation[32], however, CMS will sectorize 20 of its cells and provide 1422 voice channels, employing a 4 cell reuse pattern in which 78 channels are assigned to each cell. (CMS Direct Case Exhibits IV, pp. 17–19; Rebuttal Exhibit I, p. 39)[33] CMS has also tentatively scheduled the use of a Motorola EMX 500 switch for its second year of operation and a second EMS 500 switch for its third operational year. (CMS Direct Case Exhibit IV(a), pp. 11–12; TR 458–462) However, the total port capacity of the EMX switch (1536) is less than necessary to meet CMS' fifth year demand, and a third EMX 500 switch would be required at that time. (Rogers Rebuttal Exhibit 29, pp. 9–10, 12)

28. For its first five years of operation, CMS will expand its system capacity through the addition of channels and the sectorization of existing cells. (CMS Direct Case Exhibits IV, pp. 11–16; Exhibit IV(a), pp. 7–8) When demand exceeds the number of available channels, CMS will then add more cells and implement cell-splitting. (CMS Direct Case Exhibit III, pp. 17–18; TR 450) In this regard, beginning with its fourth year, CMS has premised its channel demand projections on a 0.05 grade of service. (CMS Direct Case Exhibit IV, pp. 13, 16)[34] CMS expansion criteria mandate system review and action when the grade of service at any cell equals or exceeds 0.05 on 21 of the 30 preceding days. (TR 442–443; CMS Direct Case Exhibit III, pp. 16–17; Exhibit IV(a), pp. 9–19) System performance will be monitored on a continuing basis throughout the

---

[32] If CMS commences service the same year as Rogers, namely, 1985, its fifth year of operation would be 1989.

[33] According to CMS, the maximum reuse capability of its system is 8.5 (34 cells divided by 4). (CMS Rebuttal Exhibit I, p. 38). However, if the number of voice channels proposed by CMS in its fifth year (1422) is divided by the number of available voice channels in the spectrum (312), the reuse ratio of CMS' system is 4.55.

[34] CMS states that this figure reflects "a worst case scenario" and "does not represent the applicant's intention to permit lessening of service quality during the fourth or fifth years." (CMS Direct Case Exhibit IV, p. 13)

initial year of system operation and during the expansion period. Based on performance data pertinent to this review, *e.g.*, distribution of user traffic, subscriber mobility, cell originations, average call duration, etc., system and per cell traffic load and grade of service will be calculated. (TR 446–451, 550; CMS Direct Case Exhibits III, pp. 15–16; Exhibit IV, pp. 10–11; Exhibit IV(a), pp. 9–10)

29. As proposed, CMS' system expansion plan will involve the introduction of undue interference, limiting or restricting the use of needed assigned frequencies. According to Exhibit III of its Direct Case, which describes the considerations and methodologies employed in designing the CMS Chicago system, for a nominal cell radius of 11 miles, typical separation for frequency reuse is about 48 miles between cell centers if omni transmit is involved on both ends, and 38 miles if both cells are using sector transmit. (CMS Direct Case Exhibit III, pp. 1, 20) An inspection of CMS' coverage map reveals, however, that by the fifth year of operation, several sectored cells in CMS' system having the same frequencies will be less than 38 miles apart. Cells 10 and 14, for example, share 54 common voice channels, yet are only 12.5 miles apart. Cells 1, 5 and 9, which share over 50 voice channels among themselves, overlap extensively. (CMS Direct Case Exhibit IV, pp. 17–19; CMS Rebuttal Exhibit I, Appendix I) All of these cells have radii of 11 miles or less.[35] If CMS sought to eliminate these problems by reducing cell radii, it could only do so by reducing its cell overlap or, possibly, its geographic area.[36]

---

[35] The distances between cells 1, 5 and 9 are 12.7 miles (Cells 1 and 5), 12.3 miles (Cells 1 and 9) and 13.1 miles (Cells 5 and 9). CMS does not indicate in its direct case when, during its first five years of operation, it would begin sectorization. Because of the proximity of the cells discussed above, co-channel interference could develop in CMS' system at any time during its first five years of operation, using either omnidirectional or sectored antennas.

[36] In its Reply Findings, CMS itself admits that, as a result of sectorization, CMS will lose some of its original cell overlap. (Paras. 36, 38) During the hearing sessions in this proceeding held April 11 and April 12, 1983, the Presiding Judge held that he would not rely on any interference testimony based on an analysis of D/R (Distance between cells/Radius of cells) ratios since these ratios were not accepted by the Commission. (TR 296, 297, 303–305) The above findings are consistent with the ruling since they are based not on D/R ratios, but on CMS' own criteria for cell spacing and on the fundamental principle that the spacing between cells should follow as uniform a pattern as possible to achieve optimal coverage with minimal intra-system co-channel interference. CMS has also taken the position that an appropriate standard for measuring co-channel interference is the C/I (carrier/interference) ratio of 17 dBu or more. (Proposed Findings, para. 78) This position is rejected. Section 22.903(c) of the Commission's Rules, 47 CFR 22.903(c), provides that, for the purpose of establishing the reliable service area of a station and performing interference studies, all cellular applicants must use procedures consistent with Section 22.504 and FCC Report No. R-6406, "Technical Factors Affecting the Assignment of Facilities in the Domestic Public Land Mobile Radio Service," by Roger B. Carey (Carey Report). The Carey Report adopts neither D/R nor C/I ratios, but establishes as the point of comparison an applicant's proposed 39 dBu contours. CMS has failed to present sufficient and

## IV. *Issue (c)*

### A. *Service Offerings and System Features*

30. In addition to its basic telephone service, Rogers will offer its subscribers the following features: call forwarding, call waiting, three party conference calling, speed calling, secretarial reversion and local operator assistance. (Rogers Direct Case Exhibits 4, p. 14; Exhibit 9, pp. 1, 3–4)[37] No demand for these features is indicated by Rogers' market study.

31. In addition to its basic telephone service, CMS will also offer its subscribers a package of features. These include call forwarding, delayed forwarding, call waiting, conference calling, direct distance and direct international dialing, credit card charging, computer prompted telephone answering, an electronic message service, cellular operator assistance, least cost routing to dedicated circuits, a voice message storage and retrieval service, prompt routing of 911 emergency calls, an emergency alert procedure, continuously updated on-caller-demand announcements on traffic, weather and airline delays, and direct access to Graphic Scanning's various data services. As with Rogers, no demand for these features is indicated by CMS' market studies. (CMS Direct Case Exhibit VI, pp. 2–5, 10–11, 17–19)[38]

### B. *Rates and Charges*

32. Rogers proposes two separate monthly rates: Option 1, where subscribers pay $30 and receive a 120 minute air time allowance, with overcalls billed at 25 cents per minute from 7:00 a.m. to 9:00 p.m., Mondays through Fridays, and at 12½ cents per minute at all other times; and Option 2, where subscribers pay $6.50 and receive a 9 minute air time allowance, with overcalls billed at 50 cents per minute. Each service option includes speed calling, call forwarding, call waiting and conference calling at no extra cost. However, under both options Rogers will impose a 3 minute minimum billing period,

---

persuasive evidence to compel acceptance of an alternative technical standard not adopted by the Commission and potentially in conflict with expressly adopted standards.

[37] Call waiting allows an individual subscriber currently engaged in a call to be alerted that another incoming call has been received. The subscriber then has a predetermined period of time in which to terminate the existing conversation and receive the second call. Otherwise, the second call is treated as a normal communication. Three party conferencing allows an individual subscriber to add a third party to an existing conversation. The secretarial reversion service allows individual subscribers to redirect calls intended for their unit to another telephone number, provided that the unit has been called and remains unanswered for a specified period of time.

[38] Delayed forwarding transfers calls to a second number from the mobile number if the call is not answered by the subscriber. Another feature offered by CMS, voice scrambling, is a function of subscriber equipment and therefore irrelevant for comparative purposes. See *Report and Order on Cellular Communications Systems*, 86 FCC 2d 469, 503 (1981). (CMS Direct Case Exhibit VI, p. 9; Rogers Exhibit 29, pp. 5–6)

and under Option 1 a two minute minimum billing period will be imposed for overcalls made during peak hours. Operator assistance under both options will cost 30 cents per call. Service to roamers will cost $1.00 per day and 40 cents per call, and dispatch service will cost $16 per unit for 1–10 units; $14 per unit for 11–20 units; and $10 per unit for over 20 units. The secretarial reversion option feature will cost 50 cents per call. (Rogers Direct Case Exhibit 4, pp. 13–14; Rogers Exhibit 9, pp. 1, 3–4)[39]

33. CMS will charge a monthly fee of $4.95 per unit for basic system access and has established a three-tier pricing structure for air time consumption. During prime hours (weekdays, 7:00 a.m. to 8:00 p.m.), subscribers will be charged 12 cents for the initial 30 seconds of each call, and 2.4 cents for each additional 6 seconds. During evening hours (8:00 p.m. to 12:00 a.m., weekdays; 7:00 a.m. to 8:00 p.m. on weekends; and on recognized Federal holidays), the company will charge 9 cents for the first half minute, and 1.7 cents for each additional 6 seconds. The charge for night hours (12:00 a.m. to 7:00 a.m.) will be 5 cents for the initial 30 seconds and 1 cent for each additional 1;10 minute. Optional services, such as call forwarding or call waiting, will cost $1.75 each, $4.75 for a package of four. CMS will also charge $3.00 for store and forward voice service, plus 5 cents per call minute; $3.00 for distant roamer service, plus a surcharge for 35 cents per minute; $4.95 for local roamer service; and 12 cents for each information call. (CMS Direct Case Exhibit VI, pp. 23–24a)[40]

34. In their rebuttal cases, each of the applicants presented comparative analyses of their proposed rates. Several methodological problems, however, undermine both. The Rogers analysis does not account for the diverse factors affecting final charges. Rogers, instead, multiplies various levels of "average monthly minutes of use" (having first subtracted Rogers allowance minutes) by the applicants' peak-hour air time charge, and adds the applicable system access fee. No consideration was given to the predictive distribution of call lengths or the daily and weekly distribution of calls. The impact of minimum billing periods, as well as the differing effects of the applicants' respective billing increments, were also ignored. (Rogers Rebuttal Exhibit 28, pp. 8–10) For its part, CMS assumes in its analysis a highly unrealistic and unsupported usage pattern. CMS based its presentation in part on an exhibit appendix which was stricken. (TR 86; CMS Rebuttal Ex. II, p. 5) CMS also assumed that 5.7% of all calls would last 6 seconds or less, that 29.9% of all calls would last 36 seconds or less, and that 41.4% of all

---

[39] Rogers basic service consists of calls to and from, or between, mobile (or portable) cellular radiotelephones. (Rogers Exhibit 9, p. 1)

[40] CMS' charges for subscriber services are on a send and receive basis. (CMS Direct Case Exhibit VI, p. 23)

calls would not last one full minute. (CMS Rebuttal Exhibit II, Appendix I, p. 10 (p(t) column)[41] Besides the fact that these call lengths are highly unrealistic, CMS' own market studies dispute these call lengths. Two surveys submitted by CMS show that "the largest percentage of calls will last two to three minutes." (CMS Direct Case Volume 2, Section IV, p. 6; Volume 2, Section V, p. 6) Yet, under CMS' rate analysis, the percentage of calls lasting at least two and not more than three minutes is projected to be only 13.6% of all calls[42], which is a far smaller percentage than CMS' projection that 41.4% of all calls would last less than one minute.

### C. *Maintenance and Personnel*

35. Rogers' maintenance staff will include three engineers presently employed by RRCS, and six additional technical personnel who will be hired if Rogers obtains cellular authorization. (Rogers Exhibit 8, pp. 1–4; Rogers Exhibit 9, p. 7)[43] These individuals will be supervised by Leon Hensen, Vice President of Engineering at RRCS, who has extensive radio common carrier experience. (Rogers Exhibit 3, p. 12; Rogers Exhibit 8, p. 1)[44] Bernard Kahn, Executive Vice President of Rogers, who has also had extensive radio common carrier experience, will have overall responsibility for the coordination and direction of the daily operations of the company. (Rogers Exhibit 9, p. 7)[45] Rogers has also identified other administrative and sales personnel and indicated that, in addition to these individuals, RRCS employs 15 administrative employees, 5 sales and customer service representatives, and 23 operators, for a total of 53 present employees. If Rogers is granted a construction permit, eight additional administrative personnel and nine additional sales representatives will be hired. (Rogers Exhibit 9, p. 7) All of the above named individuals will continue to work for RRCS, even though the stock of the company has been purchased by Metromedia. (Rogers Exhibit 37, pp. 7-16)

36. Routine maintenance on the Rogers system will consist of

---

[41] The record fails to support CMS' contention (Proposed Findings, para. 132) that the exponential distribution it employed to determine the probability distribution of call lengths is "widely accepted."

[42] CMS' comparison assumes that 69.5% of all calls will last 120 seconds or less, and 83.1% of all calls will last 180 seconds or less. (CMS Rebuttal Exhibit II, Appendix I, p. 10) Thus, the overall percentage of calls lasting 2 to 3 minutes is 13.6% (83.1 minus 69.5).

[43] The three engineers presently employed by RRCS are Anthony Godek, Richard Gast and Robert Chappelle.

[44] Messrs. Godek, Gast and Chappelle also have wide experience in both radio frequency and switching equipment. (Rogers Exhibit 8, pp. 2–4)

[45] Other named individuals are Virginia Rogers, President of RRCS; John Fujii, Vice President and Treasurer of RRCS; James Sharpe, Operations Manager of RRCS; Allen Rasmussen, Sales Manager of RRCS; and Geraldine Lutz, General Manager of RRCS. (Rogers Exhibit 3, pp. 10–15)

daily checks, including field tests of the equipment and service, through the use of auxiliary test stations. Mobile-to-land, land-to-mobile, and mobile-to-mobile calls will be placed from various points in the Chicago SMSA by Rogers personnel every day. The quality of these transmissions will be reported and logged by control point engineers, who will be on duty 24 hours per day. (Rogers Exhibit 8, pp. 7–10).

37. Emergency maintenance will be aided by the back-up and monitor features of the equipment Rogers proposes. Rogers will provide an auxiliary power source at its mobile telephone switching office (MTSO) and at each cell site in order to ensure continuous operation during emergencies and other commercial power outages. This alternative power equipment will keep the system operational for 8 hours if a power failure occurs. Each base station will alert the MTSO of any fault in the antenna, transmitters, receivers, control units, power supplies, and receiver multicoupler. Also, the MTSO will be sent an alarm in the event of a base site fire, breakdown of main power, or break-in to the locked premises. (Rogers Exhibit 8, p. 9).

38. Base station equipment will be serviced by Rogers' technicians with the assistance of factory engineers.[46] Service vehicles will be dispatched from the MTSO. During non-business hours, Rogers will have at least one licensed technician on-call who is carrying a paging unit. If a problem occurs that cannot be corrected at the MTSO by the attending engineer, the on-call technician will be paged. The technician will telephone the MTSO to determine the location and type of failure. The technician, who will have a fully equipped service van with him, can proceed directly to the trouble location with the proper test equipment and spare modules to make the repair. Rogers has budgeted funds to warehouse in inventory enough spare parts to completely rebuild an entire cell site. On the average, a technician will be able to reach a cell site in approximately 30 minutes. (Rogers Exhibit 8, pp. 5, 9)[47]

39. CMS' Chicago cellular system is one of a series proposed by Graphic Scanning in all the top 30 SMSAs. The activities of these subsidiaries will be overseen and coordinated by CMS' corporate parent, Systems, which will also provide a broad range of technical, marketing and management support. Corporate resources and personnel of both Systems and Graphic Scanning will be drawn upon to complement and enhance the capabilities of the local operating

---

[46] Anaconda-Ericsson will also conduct a training program for Rogers personnel. (Rogers Exhibit 8, p. 6)

[47] A redundant signalling channel at each site is included in the base price of Anaconda-Ericsson equipment. (CMS Rebuttal Exhibit I, Appendix IV) Also, each channel has its own control unit. (TR 494)

staffs. (CMS Direct Case Exhibit I, pp. 1–2; CMS Direct Case Exhibit VII, pp. 1–4, Appendix VII-B) The officers of CMS[48] are also officers of Systems and/or Graphic Scanning. The record is silent as to whether any of these individuals will devote any time to day-to-day administration and maintenance of the Chicago system. (CMS Direct Case Exhibit I, pp. 1, 2; Appendix I-A) For its first year of cellular operations, CMS proposes a staff of 50 persons, whose positions will be allocated among the areas of network operations, maintenance, engineering, sales and customer service, and finance and administration. Supplementing the marketing staff will be 30 individuals provided by minority and/or female agencies which CMS will assist in establishing as resellers of its cellular system. (CMS Direct Case Exhibit VII, Appendix VII-C)

40. The structural framework of CMS' maintenance plan calls for a cellular system general manager, a supervisor for technical operations, a radio frequency (RF) maintenance staff composed of Commission licensed radio technicians, and a digital maintenance staff comprised of switch technicians. (CMS Direct Case Exhibit VII, Appendix VII-D, pp. 20–21, Figure 6)[49] However, nowhere in its direct case does CMS specify the size of its local technical staff. All technical personnel will receive training prior to implementation of the cellular system, and will participate in on-going training programs thereafter. (CMS Direct Case Exhibit VII, Appendix VII-D, pp. 25–27)

41. CMS' mobile exchange switching center will be staffed 24 hours a day by qualified technical personnel. A complete system status evaluation encompassing all major hardware and software elements, will be conducted daily through diagnostic routines. Failures will be detected through alarm messages and diagnostic printout on a local teleprinter, and will be serviced immediately. The exchanges are capable of localizing failures to a board level. Local spare stocks will be maintained for all critical units, including redundant items. (CMS Direct Case Exhibit VII, p. 5)[50] Cell site

---

[48] These individuals are: William S. Wheatley, President; Richard J. Sherwin, Vice President, Sales and Customer Service; Alan K. Ganschow, Vice President, Operations; J. Douglas Wells, Vice President, Technical Services; Robert Slodowitz, Vice President, Finance and Administration; and Stanford B. Weinstein, Vice President, General Counsel and Secretary. (CMS Direct Case Exhibit I, p. 1)

[49] Appendix VII-D contains references to a "CMX" switch. The Presiding Judge recognizes that CMS does not intend to use such a switch in Chicago. (TR 18) Nevertheless, the Presiding Judge understands that the appendix, which is entitled "A Maintenance Plan for the Cellular Mobile Radio Network" is a description of the maintenance plan to be implemented by all Graphic Scanning cellular affiliates, including CMS.

[50] Exhibit IV, pp. 8–9, of CMS' Direct Case, indicate that key sites in CMS' system will be equipped with redundant installations. However, these sites are not identified. Moreover, CMS will not deploy redundant signalling channels or redundant base site control units until the fourth year of service. Page 11 of

equipment will be tested by daily diagnostic routines through the capability in the base site controller at each cell site. In addition, continuous test routines will be run at each base site controller automatically. Failures at cell sites will be immediately relayed to the mobile exchange where they initiate alarms and diagnostic printouts. Faulty modules will be removed from service automatically when alarm conditions occur, and modules can also be deactivated on command from the exchange. All cell site alarms which result in a deterioration of the grade of service will be serviced immediately; all others will be serviced within 2 hours. Cell sites will be attended from the service centers. (CMS Direct Case Exhibit VII, p. 5)

42. As a further maintenance feature, CMS, through Graphic Scanning, will provide a "Dial-up Emergency Transfer" and Control System (DUET) which will utilize the switched telephone network to test, and, when necessary, to operate remotely located equipment normally operated over designated facilities. (CMS Direct Case Exhibit VI, p. 20)[51] CMS will also provide full auxiliary power to ensure no loss of service in case of main power failure. The control point and key sites will be suppled with standby generators with sufficient fuel for two days of continuous operation. Smaller sites will be suppled with battery equipment adequate to ensure full power operation. (CMS Direct Case Exhibit IV, pp. 6–7; Exhibit IV(a), p. 3, Figure II.)

43. CMS will have access to a central organization, the Cellular Network Customer Services Bureau (CNCSB), which will handle the control and quality of service provided by Graphic Scanning affiliated cellular systems throughout the country. The CNCSB, staffed 24 hours a day, will serve as a repair depot, and will maintain a pool of specialized test equipment which will be available to any operating system when required. Further, the CNCSB will provide trouble analysis and repair to systems requiring assistance. (CMS Direct Case Exhibit VII, Appendix VII-D, pp. 20–24)

### D. *Practices*

44. Rogers will promote the resale of its cellular service by communications marketing companies and other enterprises desiring to enter the cellular marketing field. Rogers will also enclose customer surveys with each monthly bill for the first year of service,

---

Exhibit IV shows that redundant signalling will not be employed at cell sites with fewer than 36 voice channels, while Page 15 of the Exhibit indicates that no cell will have 36 voice channels until Year 4.

[51] CMS also seeks comparative preference for certain test mobile facilities described in its direct case. (Proposed Findings, para. 154) However, these facilities do not appear in Exhibit IV(a) of CMS' Direct Case, in which the Presiding Judge directed CMS to specify "with particularly what equipment will be used in the first year of its system." (TR 46) Subsequently, the Presiding Judge ruled that any item not listed in this exhibit could not be argued to give CMS any comparative advantage. (TR 80–81)

and solicit customer complaints. Any complaints brought to the company's attention will be resolved within 24 hours, if possible. A monthly summary of complaints will be prepared for the company's officers and chronic problems will be presented to the Board of Directors. Rogers has also specified the Equal Employment Opportunity guidelines which the company will follow. (Rogers Exhibit 9, pp. 9–12, 39–45)

45. CMS' ultimate corporate parent, Graphic Scanning, has established a plan to fund the creation of at least three local minority and/or female controlled organizations to engage both in retail and service functions with respect to marketing CMS' cellular service, and in the sale, rental, service and installation of consumer mobile telephone equipment. Graphic Scanning has agreed to invest up to $3,000,000 for the establishment of these business in the top 30 cellular markets, $100,000 of which has been allocated to the Chicago market. In addition, Graphic Scanning has entered into an agreement with Atalanta Investment Company, Inc., a federally licensed small business investment company, pursuant to which Atalanta will invest $3.00 for every dollar which Graphic Scanning invests. (CMS Direct Case Exhibit VII, p. 6, Appendix VII-F)[52]

46. CMS also proposes to reserve a position on its Board of Directors for a Consumer Affairs Representative. (CMS Direct Case Exhibit VII, p. 4) In addition, CMS will maintain a customer service center which will be accessible by toll-free telephone lines. CMS personnel manning this center will record questions and complaints and direct all inquiries to the pertinent departments with a response due back within a specified, abbreviated period of time. CMS' customer service organization will be supported by the customer and community relations division of Systems, which will operate a 24 hour a day/365 days per year hot line to respond to subscriber difficulties. (CMS Direct Case Exhibit VII, p. 4; Exhibit VII, Appendix VII-D, pp. 21–23) CMS will also promote the resale of its cellular service. (CMS Direct Case Exhibit VI, p. 26)

## *CONCLUSIONS*

1. This proceeding involves the mutually exclusive applications of Rogers Radiocall, Inc. (Rogers) and Cellular Mobile Systems of Illinois, Inc. (CMS) for authority to construct and operate a new cellular system in the Chicago, Illinois modified Standard Metropolitan Statistical Area (SMSA). The two applicants have been found to be legally, technically, financially and otherwise qualified. For the reasons articulated, *infra*, it is determined that the public interest would be better served by a grant of the Rogers application.

---

[52] Pursuant to the Commission's *Report and Order, supra*, the sale, rental, service and installation of subscriber equipment is irrelevant to the comparative issues in this proceeding.

*Issue (a)*

2. Issue (a) calls for a comparison of the geographic areas[53] which the applicants propose to serve, the relative demand for service in those areas, and the ability of each applicant's system to accommodate the anticipated demand for both local and roamer service. Rogers merits a substantial preference relative to this aspect of the comparative evaluation.

3. The Commission, in ruling that the geographic area to be served is a major factor of comparison, noted that the presence of densely populated regions and highways and areas likely to have high mobile usage characteristics are to be considered in this evaluation. Also to be considered is a showing of public need for this service, particularly the results of public need surveys. 91 FCC 2d at 520, n.20

4. Rogers' proposed geographic area is 3,213 square miles and contains a population of 7,005,000. The composite 39 dBu contours proposed by CMS cover 3,086 square miles and a population of 6,947,000. Thus, Rogers' geographic area exceeds CMS' by 127 square miles and will be able to serve 58,000 more people. Each of the applicants will serve certain discrete areas not covered by its competitor. Significantly, the area proposed to be served by Rogers encompass primarily municipal service areas and rural centers. These discrete areas are more densely populated, contain more special user concentrations, such as significant traffic interchanges, and will generate more users.

5. It is undisputed that, with its proposed 34 cell system, CMS will provide greater "depth of coverage" than Rogers in the applicants' first year systems. However, no preference will be awarded to CMS on this basis. To begin with, the concept of "depth of coverage" is not encompassed by any of the issues in this proceeding. Indeed, in its *Report and Order on Cellular Communications Systems*[54], the Commission ignored this alleged criterion as a basis for comparative analysis. Moreover, CMS' superiority under this standard is both deceptive and meaningless. The "depth of coverage" analysis contained in CMS' Rebuttal Case (Exhibit 1, pp. 4–8) is premised on the applicants' first year systems and their exclusive use of omnidirectional antennas. However, Rogers will implement cell-spliting and sectorization in its system beginning with its second year of operation. Likewise, although CMS does not specify when it intends to sectorize its antennas, it will do so at any time during its first five years of service, if demand warrants. By CMS' own

---

[53] As noted, *supra*, at n.4, for purposes of comparison, the geographic area that an applicant proposes to serve includes that area within the proposed 39 dBu contours which, in turn, falls within the proposed CGSA and the relevant SMSA.

[54] 86 FCC 2d at 502–503

admission, such sectorization will reduce its depth of coverage advantage. Thus, any superiority CMS might claim for its cell overlap would be extremely short-lived. Moreover, although the "depth of coverage" proposed by CMS exceeds that of Rogers, CMS has failed to demonstrate that the cell overlap in Rogers' system would be insufficient to accommodate demand. Finally, as discussed in the findings, the multiple cell overlap in CMS' system will also generate undue co-channel interference.

### *Relative Demand for Service*

6. Both of the applicants claim to have based their system designs on the results of their public demand research. Rogers, however, has provided a significantly more reliable analysis of the extent and distribution of demand for cellular service in the Chicago SMSA. The Walker survey questionnaire, on which Rogers demand projections are based, contained all the information necessary to establish its reliability: proposed rates, type of service, and area of service were adequately described. From the results of this survey, Compucon forecast the need for cellular service on a census tract basis for a ten year period. Although this forecast is based on certain unproven assumptions[55], these premises and Compucon's methodology are all explicitly stated and appear to be reasonable.

7. By contrast, the CMS public need showing suffers from major inadequacies. CMS' greatest deficiency is its failure to establish a nexus between the findings of its market studies and its projections of demand and demand distribution. It is unclear, for example, how the six studies which CMS has submitted, each indicating a different level of need for cellular or paging service, support CMS' projected need of 4,802 users.[56] Without further explanation of its calculations and operating assumptions, this figure is meaningless.[57] CMS fails to explain how it used data on household densities, employment and traffic patterns to project models of cellular usage. This claim would appear to be inconsistent with the semi-uniform "standard" user distribution model on which its channel plan is based. CMS' research also rests on certain dubious assumptions which prejudge the nature of the Chicago cellular market. For example, because of the nature of cellular service, a two-way communications system, demand characteristics for this service may well be different than those found in

---

[55] Compucon assumes, for instance, that potential cellular users will be primarily businesses, and based its demand distribution on the premise that construction activity, high income, and other factors will be indicators of cellular demand.

[56] CMS' demand projections do not appear to consider the presence of a wireline carrier in Chicago.

[57] CMS' demand projection is troubling for other reasons as well. Since all six of the CMS studies are surveys of businesses, it is unclear why CMS based its projected demand figure on Chicago's general population. Moreover, CMS' assumption that first year demand will always be 15% of fifth year demand is wholly unsupported.

paging services. Yet the identification and linkage of paging with cellular radio is an underlying assumption of CMS' research and serves as the ultimate basis of its demand projection. CMS' assumption that there exists a consistency of demand for cellular radio among markets is equally questionable. This assumption is stated explicitly in the Claritas study, in which apparently no Chicago SMSA businesses were surveyed, and is implicit in the Westat Report, where data from interviews in all top 30 SMSAs were combined. It also appears to be the basis for CMS' ultimate demand projection, which rests on a categorization of the top 30 SMSAs into three ranges of need. CMS' reliance on this assumption raises serious doubts as to whether its demand projections rest on an in-depth examination of the Chicago market, or on national generalizations of unknown relevance to the subject SMSA.

*Ability to Accommodate Anticipated Local Demand*

8. Rogers' demand research is the basis of its system design, and was instrumental in the initial placement of a cellular grid over the SMSA for the initial selection of cell sites, in sizing the cellular system, in evaluating channel requirements, and in developing an expansion plan. Rogers 39 dBu contours appear to cover most of the territory defined by Compucon as an area of high potential cellular usage, and its cells appear to be located as close as possible to an idealized cell grid. During its first year of service, Rogers proposes an 18 cell system, configured with omnidirectional antennas, using switch and base station equipment manufactured by Anaconda-Ericsson, and employing 351 voice and 18 signalling channels. These channels will provide subscribers with a 0.01 grade of service based on the Poissant traffic formula, assuming an average 101 second holding time.

9. Like Rogers, CMS claims to have based its system design on its public demand research.[58] If that is true, the deficiencies found in CMS' forecasts, *supra*, would erode its engineering proposal as well. It appears, however, that CMS' market surveys were not used to determine where Chicago cellular users would be located. Instead, CMS adopted a semi-uniform channel distribution methodology not specific to the Chicago SMSA. As a result of this approach, CMS' cells will serve widely varying populations. Moreover, CMS' cell sites do not appear to fall on any discernible idealized grid pattern. Rather, the record reflects that CMS' system will suffer from co-channel interference in its first year of operation as a result of overlap between Cells 4 and 20, which share a common signalling channel.

---

[58] CMS' proposed 39 dBu contours will, as noted in the Findings, para. 19, *supra*, cover areas in the Chicago SMSA having high household density and high densities of upper income households.

10. For its first year of operation, CMS proposes a 34 cell omnidirectional system using a Motorola EMX 250 switch and base station equipment manufactured by Motorola, E. F. Johnson and Graphic Scanning. CMS will also equip its initial system with 301 voice and 34 signalling channels, providing subscribers with a 0.01 grade of service based on Erlang B traffic formula and assuming a 94 second average holding time. However, the Motorola EMX 250 switch lacks sufficient capacity to serve the number of voice channels CMS has initially proposed. Moreover, CMS' choice of the Erlang B formula will result in a lower grade of service than that proposed by Rogers since Rogers will have more channels in its system at all times to serve anticipated demand.

### *Ability to Accommodate Anticipated Demand for Roamer Service*

11. Under CMS' proposal, the foreign subscriber registered in the Chicago system could be reached by a single, unchanging access number followed by the foreign subscriber's home system number. Roger's proposal would assign the registered foreign subscriber a different temporary directory number each time he visited the Chicago area. As a result, callers in Chicago who wished to contact the roamer could do so only after securing the roamer's temporary number from the foreign subscriber or a system operator. Since CMS' approach would minimize this inconvenience to both the foreign and the local subscriber, some credit is deserved. However, the credit accorded CMS will be slight since the inconvenience of the Rogers approach is a minor one, and Rogers' superior grade of service, *supra*, will provide an excess capacity in its system as a cushion against roamer demands.[59]

### *Issue (b)*

12. The second major issue for comparative consideration is each applicant's proposal for expanding its system capacity in a coordinated manner within its proposed CGSA in order to meet anticipated increasing demand for local and roamer service. In making this comparison, the Commission directed in its designation order, "preference should be given to designs entailing efficient frequency use, including not only the applicant's plans with regard to cell-splitting and additional channels, but also the degree of frequency reuse the system will be capable of, and the applicant's ability to coordinate the use of channels with adjacent or nearby cellular systems."[60] Rogers will receive a substantial preference under this issue.

---

[59] Neither Rogers nor CMS has attempted to project the demand for roamer service in the Chicago SMSA. As a result of its proposed grade of service, the Rogers system will have more channels available for usage for whatever need arises.

[60] 91 FCC 2d at 521, n. 21. See also *Report and Order*, 86 FCC 2d at 502–503.

13. Both Rogers and CMS claim to have designed their systems on the basis of their respective market research studies. While this is true for Rogers, CMS used the same formula for projecting subscriber growth in every market where it has applied, without adjusting for demographic variables. Contrary to its claim, CMS has not tailored its expansion plans to meet the needs and demands of the Chicago SMSA. Moreover, since CMS has configured its system on the basis of its five year projections, its expansion plan will require substantial modification if, as appears likely, the volume and distribution of demand do not follow the patterns CMS has predicted. Rogers' phased-in approach will enjoy greater flexibility.

14. Rogers expansion proposal is superior to CMS' in other respects as well. While Rogers' switching capacity is fully adequate well into the foreseeable future, CMS will not be able to meet its projected user demand with its two proposed EMX 500 switches in its fifth year of service. Rogers will also offer its subscribers a higher grade of service. While both applicants proposed to lower their grades of service after their initial operating years, the decrease proposed by Rogers (to P.02) is less drastic than that on which CMS has premised its channel demand projections after its third year (B.05), and will result in a higher quality of service. Rogers has also demonstrated a greater reuse capability than CMS. Rogers' frequency reuse ratio will be 6.72 in its fifth year of service; CMS' will be 4.55. Finally, CMS' system will suffer undue intra-system interference as the system expands, limiting or restricting the use of assigned frequencies.[61]

*Issue (c)*

15. Issue (c) calls for a comparison of the nature and extent of the service proposed by each applicant, including each applicant's proposed rates, charges, maintenance, personnel, practices, classifications, regulations and facilities (including switching capabilities). In its *Report and Order*, the Commission specifically noted that this issue was generally less significant than the first two issues. The Commission also held that, although the adequacy of base station and switching facilities and related maintenance proposals may be an issue in some cases, the agency did not expect this to be a significant issue in general. Finally, the Commission ruled that personnel and practices would be significant "to the extent that they affect an applicant's ability to implement its proposal."[62] On the basis of the record evidence, Rogers will be given a slight preference under this issue.

---

[61] Since no cellular systems adjacent to Chicago are constructed or authorized, a comparison of the ability of the applicants to coordinate the use of channels with such systems cannot be made.

[62] 86 FCC 2d at 503

*Service Offerings and System Features*

16. Both Rogers and CMS will offer a variety of features to their subscribers in addition to basic telephone service, and the record shows that more will be offered by CMS. However, CMS will receive no comparative credit for these offerings since it has failed to demonstrate that any need for them exists.[63]

*Rates and Charges*

17. CMS will receive a preference for its proposed rate structure. CMS will charge a lower monthly access fee than Rogers ($4.95 vs. $30.00), and has further structured its rate proposal to ensure that each subscriber is charged only for actual use of the facilities. Accordingly, CMS will neither impose an air time allowance nor compel the subscriber to take undesired customized services. Rogers, however, has bundled both a 120 minute minimum air time fee and several customized services into its monthly access fee. As a result, Rogers' lower-use subscribers, with respect to air time and customized services, will effectively subsidize higher use subscribers. Moreover, CMS proposes 6 seconds incremental billing after the initial 30 seconds of each call. By contrast, Rogers' proposal incorporates 2 and 3 minute minimum calling period followed by per minute incremental billing. This might result in a Rogers subscriber being billed for unused air time. Finally, by establishing progressively lower prices for "prime", "evening" and "night" hours, CMS encourages use of the system during off-peak hours, thereby distributing demand for cellular service more evenly throughout the day. In contrast, Rogers pricing structure does not reflect a full commitment to multi-tier pricing as evidenced by its more limited two-tier pricing structure. In sum, CMS' proposal better encourages efficient use of available spectrum and system facilities.

18. CMS' preference for its rate proposal, will be only slight. Both CMS and Rogers have presented comparative analyses of their proposed rates, but several methodological problems undermine each. Moreover, neither applicant has offered evidence establishing the methodology used in formulating its proposed charges. As a result, it is impossible to determine whether or not the proposed rates are realistic. Accordingly, neither applicant will receive comparative credit for its allegedly lower rates, and CMS' preference for its rate structure will be slight.[64]

---

[63] *Houston Mobilfone, Inc.*, 65 FCC 2d 848, 852 (Rev. Bd. 1977), *review denied*, FCC 78–477 (July 11, 1978), *remanded Mobilfone Service, Inc.* v. *FCC*, 605 F. 2d 572 (1979); *affirmed Houston Mobilfone, Inc.*, 78 FCC 2d 1067 (1980)

[64] *Houston Mobilfone, Inc.* 65 FCC 2d at 859 (1977)

### *Maintenance and Personnel*

19. Both Rogers and CMS have extensive experience in mobile communications, and propose to rely on personnel with such experience to operate their proposed systems.[65] However, the officers of CMS, including its Vice Presidents for Operations and Technical Services, are also officers of CMS' parent organization, and the record is silent as to whether any of these individuals will devote any time to the day-to-day administration and maintenance of the Chicago system. CMS has failed to establish that these individuals will meaningfully contribute to implementing its proposal. Consequently, Rogers will be given a slight credit for its personnel plan.

20. Both Rogers and CMS propose to monitor their systems 24 hours a day, perform daily maintenance checks, and institute various emergency maintenance measures which will allow for an almost immediate response in the event of system or individual equipment failure. Each applicant will also provide training programs for technical personnel, maintain auxiliary power, and warehouse an inventory of spare parts. However, a minor deficiency in CMS' maintenance proposal entitles Rogers to a slight preference under this standard. Although CMS provides a structural framework for its maintenance plan, nowhere in its direct case does it specify the size of its local technical staff. In the absence of such evidence, Rogers' more specific proposal is entitled to a slight preference.[66]

### *Practices*

21. Both Rogers and CMS will promote the resale of their services. Both have also proposed various measures designed to promote better customer service. Nothing in the record indicates, however, that the differences in these proposals have any decisional significance. Moreover, while CMS' plan to fund minority and/or female controlled organizations to engage in retail and service functions is meritorious, current Commission precedent does not support the granting of a preference on the basis of such proposals in

---

[65] Since both applicants have broad experience in mobile communications, neither is entitled to a preference on that score. In any event, "experience is something that can be acquired, generally conferring only an initial advantage to those who have it." *Houston Mobilfone, Inc.*, 65 FCC 2d at 857.

[66] The record also indicates that CMS will not deploy redundant signalling channels or redundant base site control units until its fourth year of service. Although Rogers will incorporate such redundancy in its system from the start, it will receive no additional credit for doing so since the Commission's *Report and Order on Cellular Communications Systems* does not indicate that redundancy is a factor of comparative significance in cellular proceedings. Moreover, the Presiding Judge agrees with the Separated Trial Staff that an applicant seeking a preference for redundancy in its maintenance proposal must perform a cost benefit analysis. *Frank K. Spain*, 77 FCC 2d 20, 25 (1980) Rogers has failed to perform such an analysis.

the common carrier area. Accordingly, no preference for the proposed practices of the applicants will be awarded.

*System Facilities*

22. Both applicants have proposed the use of equipment adequate to furnish the cellular service they propose. Accordingly, neither will receive a preference for their proposed system facilities.[67]

## *Ultimate Conclusions*

23. In summary, Rogers has received a substantial preference under issue (a) for its proposed geographic area and population; for its superior demand projections; and for its ability to accommodate anticipated local demand. These credits outweigh the slight preference CMS has earned for its ability to accommodate anticipated demand for roamer service. Rogers also deserves a substantial preference for its superior expansion plan (issue (b)). Under issue (c), Rogers' two slight preferences for maintenance and personnel outweigh CMS' slight preference for its proposed rate structure. On balance, Rogers is the preferred applicant in this proceeding under all the issues.

Accordingly, IT IS ORDERED that the application of Rogers Radiocall, Inc. (File No. 26040-CL-P-(18)–82) IS GRANTED and the application of Cellular Mobile Systems of Illinois, Inc. (File No. 26181-CL-P-(34)–82) IS DENIED.[68]

IT IS FURTHER ORDERED that the grant to Rogers Radiocall, Inc. IS CONDITIONED upon its obtaining the appropriate antenna structure clearances and Canadian coordination where needed.

FEDERAL COMMUNICATIONS COMMISSION
THOMAS B. FITZPATRICK,
*Assistant Chief Administrative Law Judge*

---

[67] Although the equipment proposed by CMS is adequate, its proposal is inferior to Rogers in other respects due to CMS' failure to propose a sufficient number of switches and less redundancy in its system.

[68] In the event exceptions are not filed within 30 days after release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Sections 1.276(d) and 22.916(b)(9) of the Commission's Rules.

**CATV Carriage, Sports Programming**
**Reconsideration, Petition for, Grant of**

**Reconsideration granted in part to clarify prior action delineating responsibilities of parties seeking sports programming blackouts.**

**–*Service Electric Cable TV, Inc.***

FCC 84-60

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| In re: | |
|---|---|
| Amendments to Part 76 of The Commission's Rules to Require Substantiation of Requests for Carriage or Nonduplication to Cable Television Systems<br>Request for a Declaratory Ruling By Service Electric Cable TV, Inc. and Service Electric Cable T.V. of New Jersey, Inc.<br>Petitions for Reconsideration | RM-4098 |

## MEMORANDUM OPINION AND ORDER

(Adopted: February 24, 1984 Released: March 1, 1984)

BY THE COMMISSION:

1. On January 14, 1983, Major League Baseball (hereinafter "Baseball"), an association of professional baseball clubs, filed a petition for reconsideration seeking either reconsideration or clarification of the Commission's decision in its *Memorandum Opinion and Order in RM-4098*, 92 FCC 2d 1058 (1982). On January 17, 1983, a similar petition was filed jointly by the National Basketball Association, the National Hockey League, North American Soccer League, and the Major Indoor Soccer League (hereinafter collectively "the Leagues"). Service Electric Cable TV, Inc. and Service Electric Cable T.V. of New Jersey, Inc. (hereinafter jointly "Service Electric"), the multiple cable television system operators who were the proponents of the rulemaking and declaratory order requests in *RM-4098*, *supra*, have filed comments on Baseball's and the Leagues' petitions for reconsideration.

2. In March 1982, Service Electric sought a declaratory ruling that the request by the Philadelphia Phillies baseball club (hereinaf-

ter "the Phillies") that Service Electric delete certain distant signal baseball telecasts was insufficient, pursuant to Section 76.67 of the Commission's Rules, to trigger Service Electric's obligations thereunder. In addition, Service Electric sought institution of a rulemaking proceeding to amend Part 76 of the Rules to require that in the future such deletion requests be accompanied by documentary substantiation. In *RM-4098, supra,* the Commission denied Service Electric's rulemaking petition, but granted in part the requested declaratory ruling. The Commission found that, in view of the infrequent instances of notification problems concerning sports programming deletion requests, the imposition of further paperwork burdens was not warranted. *Id.* at 1065. However, the Commission did note that ambiguities in notifications increase the complexity of compliance, and therefore issued a declaratory ruling that:

> To include the identity of each system from which protection is expected on the notice would not seem unduly burdensome. Specific community units can, we believe, be adequately identified for purposes of the notice requirement by reference to the principal community within which the system is identified (*i.e.*, protection is sought on a given system's headend, including the community units served from that headend).

*Id.* at 1064–1065. It is this language which is the focus of Baseball's and the Leagues' present petitions.

3. In support of its petition, Baseball contends that the above-cited language from *RM-4098, supra,* can be utilized by cable systems to avoid their obligations to provide sports blackout protection in communities not identified in a notification—in particular, newly-wired communities not listed by the Commission until several months after operations commence. Baseball argues that it should be sufficient to identify the affected communities as specifically as possible, without identifying in addition which communities are headend communities, which Baseball notes is a more difficult task, since headend communities are not identified as such by the Commission. Baseball proposes to identify specifically all communities within each ball club's 35-mile zone served by a particular addressee, and to request protection in these and other communities served from those communities' headends in all future initial notifications. This, argues Baseball, provides more information than would simple headend identification, which may, due to processing backlogs at the Commission and at other sources, be out of date. In addition, claims Baseball, headend identification would be more complex than community-by-community identification, which would be specific enough. Baseball further contends that its practice of mailing its notifications to the mailing addresses chosen by the cable system operators—as indeed Section 76.12 of the Rules requires—should not be criticized, and that Baseball should not have to include a listing of affected communities in any supplemental notifications it may send, as this would be needlessly repetitive and expensive.

4. The Leagues contend that their notifications already are sufficiently specific to meet the Commission's concerns, as they identify each affected community unit individually. However, the Leagues contend that such identification should only be necessary on initial notices, and not be repeated on supplemental notices during the year, as both the Leagues and affected system operators then already know which communities are affected.

5. Service Electric filed "Comments" on Baseball's and the Leagues' petitions on January 27, 1983. Service Electric concurs that "mere headend identification could be difficult and not required under the Commission's rules," and states that Baseball's community-by-community identification proposal will satisfy both Service Electric and the Commission's Rules. In addition, Service Electric agrees that notifications need only be mailed to the mailing address on file with the Commission. Finally, while Service Electric agrees that full community lists need not be incorporated into supplemental notifications, Service Electric requests that the principal communities affected be identified. Service Electric suggests that this is not a burdensome requirement, and would help it to afford requested protection more quickly.

6. We feel it appropriate, in view of petitioners' concerns, to clarify the parameters of our prior opinion. As we noted in *RM-4098*, 92 FCC 2d at 1064, "The Commission has on a number of occasions stressed that it expects a high degree of cooperation and good faith between cable television system operators and parties seeking to exercise rights under the program deletion rules." Our purpose in delineating a suggested compliance method was to further such cooperation in a way that would neither be unnecessarily complex nor burdensome on any party. Therefore, parties may use principal community, or headend, or any other method reasonably likely to identify communities in which blackout protection is sought. If system identification by principal community (*e.g.*, the identifying community from the *Television Factbook*, or the town or city from which several community units are served) is chosen, this identification should suffice to identify the affected community units not encompassed in a community-by-community listing. Community-by-community identification is obviously also acceptable.

7. In addition, we agree with Baseball and the Leagues that once such a listing of affected communities is given with an initial notification of blackout requests, it is not necessary to include duplicate listings with supplemental or revised notifications. At the same time, any such supplemental or revised notification should refer in some clear fashion to the earlier listing of affected communities, although we do not feel that there is a need to specify the form of such reference. Finally, we agree that notifications are properly sent when directed to the mailing address chosen by a cable television system operator. If this is in some cases a community

distant from those in which sports blackout protection is sought, this is the operator's choice.

8. In view of the foregoing, we find that grant of the petitions for clarification to the extent indicated above is in the public interest.

9. Accordingly, IT IS ORDERED, That the petitions for clarification filed by Major League Baseball, the National Basketball Association, the National Hockey League, North American Soccer League, and the Major Indoor Soccer League, on January 14 and 17, 1983, ARE GRANTED to the extent indicated in paragraphs 6 and 7, *supra.*

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

**Business Radio Service, Frequencies**
**Frequency, Efficient Use of**
**Rules, Exemption From**
**Rules, Failure to Conform**

Memorandum Opinion and Order adopted affirming Private Radio Bureau's deletion of fifteen 800 MHz trunked channels for failure to meet loading requirements of Rule 90.366(d). –*Smith Communications Systems, Inc.*

FCC 84-30

BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
Application for Review of

Specialized Mobile Radio Station
WQA-569, licensed to
Smith Communications Systems, Inc.
Dallas, Texas

## MEMORANDUM OPINION AND ORDER

(Adopted: January 30, 1984 Released: February 2, 1984)

BY THE COMMISSION:

1. The Commission has for consideration Smith Communications Systems, Inc.'s (Smith) Application for Review of the Private Radio Bureau's Order issued July 27, 1983. The Order denied Smith's Petition for Reconsideration of the Bureau's December 29, 1982, determination which deleted 15 of Smith's authorized channels for Specialized Mobile Radio System (SMRS) WQA-569. The channels were deleted as a result of Smith's failure to meet the minimum loading requirements specified in Rule 90.366(d). Also under consideration is a Motion to Stay the effect of the Bureau's Order.[1]

2. In its Application for Review, Smith is seeking reversal of the Bureau's July 27 Order and the reinstatement of its full 20 channel authorization. In the alternative, Smith requests an extension of time to attempt to load its system to 90% of capacity (450 mobiles) so that it may keep the ten channels which it has already constructed.

3. There is a waiting list of 16 SMRS applicants desiring channels in the Dallas area. Reassignment of the channels deleted

---

[1] On October 31, 1983, Smith filed Supplements to its Application for Review and Motion for Stay to report that its system had 494 control and mobile units.

from Smith's authorization has been held in abeyance pending the outcome of our determination.

## *BACKGROUND*

4. Smith's license was granted on October 9, 1980, for a 20 channel system to be constructed in stages. Rule 90.375(e), then in effect, required an SMRS licensee which elected to construct in stages to build five channels within one year of license grant and to load the system to 70 percent of five channel capacity (350 mobiles) within two years of grant.[2] In Smith's case this meant that its first five channel stage had to be constructed by October 9, 1981, and loaded to 70 percent of capacity by October 9, 1982.

5. Smith's system was inspected by Commission engineers on October 29, 1982. The first five channels of the system had been constructed and were operational. One hundred and thirty-six mobile units were associated with the system. Since Smith did not meet the loading requirements of the Rules, the Bureau notified Smith on December 29, 1982, that its 15 unused channels were being taken back for reassignment to SMRS applicants on the Dallas waiting list.

6. Smith filed a Petition for Reconsideration of the Bureau's action on January 12, 1983, which was supplemented by submissions on January 19, June 7, and July 13 and 20. In its Petition, Smith made three basic arguments. First, it argued that bad economic conditions justified extending the two year loading requirements of the Rules. Second, it urged that because a number of its system users had service which was interconnected with the public switched telephone network (PSTN), a strict mobile number test should not be applied to it. Finally, Smith suggested that SMR systems in the Dallas area which had not met the loading standards should be ranked according to degree of compliance and that the systems with the worst record of compliance should have their channels taken back first. Smith hoped that by using this method it would not be necessary for it to lost any frequencies. By its Order of July 27, 1983, the Bureau denied Smith's petition.

## *DISCUSSION*

7. Smith does not contend that its system met the requirements of Rule 90.375(e) [now 90.366(d)] on October 9, 1982, in seeking to have the Bureau's Order reversed. Instead, Smith pleads that the Bureau treated it differently than other SMRS licensees in giving credit for mobile units on the system; that the Bureau erred in not

---

[2] With the adoption of our *Second Report and Order*, PR Dockets 79–191, *et al.*, 90 FCC 2d 1281 (1982), which became effective on October 16, 1982, the rules governing SMR systems were revised and renumbered. Rule 90.375 became Rule 90.366, but the construction and loading requirements did not change for existing licensees.

checking with everyone on the Dallas waiting list to determine if they still desired frequencies before taking back Smith's; that the Bureau erred in not inquiring into the reason for the slow loading of some Dallas SMRS licensees; and that the Bureau erred in not exempting interconnected systems from the mobile loading requirements of the Rules. Finally, Smith suggests that if its other arguments fail, it be given "three or four months" to try to comply with Rule 90.366(c) so that it may keep the five channel second stage which it has already constructed. We do not find any of Smith's contentions or suggestions persuasive.

8. Smith states that the Bureau gave no credit for "mobile units in process of going onto the system" in determining whether the loading standards had been met. Therefore, it argues that it is not being treated equitably. It is apparent from its pleading that Smith is referring to the number of mobiles it may have had on its system when the Bureau's Order was released on July 27, 1983. We fail to see the significance of this argument since Smith was supposed to have 350 mobiles on its system on October 9, 1982. It is undisputed that it did not. In short, Smith knew what was expected of it to keep its 20 channels when it elected to construct in stages. It did not meet those requirements. We do not consider the fact that Smith's system may have had 350 mobiles using it nine months after it was supposed to be loaded and seven months after it was notified that action was being taken against it for its failure to load as constituting compliance with the Rules. Licensees may exercise their procedural rights but the requirements of the rules are not tolled while they do so. Consequently, the count of the mobile units as of July 27 was irrelevant.[3]

9. Smith next asserts that the Bureau erred in not accepting its suggestion that all applicants on the Dallas waiting list be contacted to determine if they still desired frequencies before acting to delete Smith's channels. Smith does not indicate how it knows that the Bureau did not accept this suggestion, but argues that the Bureau acted in "an arbitrary and capricious manner" and should be ordered to contact each user on the waiting list "before taking channels in heavy use by the public away." Rule 90.366(d) states that whenever (1) a system which has elected to construct in stages does not meet the two year loading requirement and (2) a waiting list for frequencies in that geographical area exists, then (3) the license for channels in excess of five cancels automatically. Thus, when the first two conditions exist, the third comes into play automatically. Therefore, the Bureau did not act either arbitrarily or capriciously.

---

[3] It is not clear that Smith had 350 mobiles even on July 27. A July 20 letter from Smith's attorney (Exhibit IV to the Application for Review) confirms the Commission engineer's count of 306 mobiles "installed and in service" and states that 46 more mobile units "are *on order* from the manufacturer and license applications are either on file or *in preparation*." (Emphasis added.)

Finally, Smith posits that a situation could arise where there are more channels being taken back than there are applicants on the waiting list with the result that channels would be held in reserve contrary to the public interest. However, that did not occur in the instant case. After all the "take backs" in the Dallas area and the distribution of those frequencies to waiting list applicants, there are still 16 more applicants on the waiting list. Accordingly, Rule 90.366(d) still requires that Smith lose its unused frequencies.

10. Smith's contention that the Bureau acted arbitrarily or capriciously in rejecting its request to determine the reason for the slow loading of some systems in the Dallas area is without merit. The Bureau as a matter of course investigated all of the SMR systems in Dallas and began channel recovery proceedings in appropriate cases. This was begun prior to Smith's suggestion that the Bureau look into the apparent slow loading of some specific systems.

11. Smith next challenges the Bureau's application of its loading requirements. In addition to considering the number of mobile units on a system, Smith argues that the Bureau's rules also contemplate acceptance of channel occupancy data as a means of demonstrating that a system is fully loaded. Smith has submitted air time data which, in its view, proves that when users are interconnected with the PSTN, fewer users will fully occupy the system. We find that the Bureau has properly applied the rules. Our loading requirements for SMRS/Trunked systems are not affected merely because a system is interconnected with the PSTN. *Memorandum Opinion and Order*, Docket 20846, 48 FR 29512, 29513 n. 4 (June 27, 1983). Furthermore, we have consistently refused to accept evidence of actual channel occupancy or air time data to show that a system is being used efficiently. We have rejected this approach because it does not afford an administratively feasible means of evaluating system usage. For one thing, we lack the underlying data that would allow us to develop appropriate criteria for judging such submissions. *See Memorandum Opinion and Order*, PR Docket No. 79–191, *et. al.*, FCC 83–474 (released November 1, 1983). Further, to the extent Smith's arguments on this issue may be construed as a waiver request, we find that a waiver would be inappropriate. Smith's situation is no different than that of most other SMRS licensees; SMRS systems are often interconnected with the PSTN. Thus, Smith's interconnection by itself does not warrant our waiving the rules. We find, therefore, that the data supplied by Smith is insufficient to show that his system is adequately loaded.

12. Finally, we come to Smith's request that we permit it an additional three or four months to load its system to 450 mobiles so that it will comply with the Rules for the ten channels it has already constructed. We decline to grant such a request. Smith did not meet the loading requirements for its first five channel stage on its two year anniversary date. Sometime between its January 12, 1983,

submission of its Petition for Reconsideration and its June 7, 1983 supplement, Smith constructed an additional five channels.[4] Such construction was undertaken in violation of Rule 90.366(d) which provides that a licensee cannot begin construction of the next stage of a system until it has shown that the first stage meets the 70% loading requirement. Smith has presented no unique facts to warrant a waiver of the rules. Smith argues that it will face a "substantial capital loss" if this request is not granted. As stated in *AAT Electronics Corporation*, FCC 81-170 (released May 16, 1983) at ¶ 47, "[Smith's] actions were taken at its own risk in an effort to create equities for itself and bind the Commission. We decline to be so manipulated."

## *CONCLUSION*

13. None of Smith's arguments persuade us to grant its Application for Review or to reverse the Bureau's decision. Smith does not deny that it did not meet its October 9, 1982, loading date. Its first three arguments do not attempt to excuse or justify this failure, but rather attempt to attack Bureau procedure. We found, as discussed above, that none of those arguments had merit. Smith's interconnection argument does not convince us that our decisions concerning applying a mobile number test as the sole method of determining spectrum efficiency are incorrect. For these reasons, we affirm the Bureau's action taken December 29, 1982, deleting 15 channels from Smith's 20 channel authorization and we affirm the Bureau's Order denying Smith's Petition for Reconsideration. We deny Smith's request for an extension of time to try to load its system.[5]

14. Accordingly, Smith's Application for Review and Motion for Stay are DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

---

[4] This is based on the reference in the January 12 document (Exhibit III) to "Smith's five channels now in service" and the reference in the June 7 document (Exhibit IV) that "all ten authorized channels" were being used.

[5] Based on Smith's latest filing (see footnote 1) Smith now is eligible to apply for additional frequencies, pursuant to Rule 90.366(c), and may do so.

**Forfeiture**

**Request for mitigation or remission of forfeiture on basis that the rule violations were all due to incorrect advice and deception of licensee's attorney/engineer denied. Commission has consistently refused to excuse licensees from forfeiture penalties where action of its employees or independent contractors resulted in a rule violation.**

***–Triad Broadcasting Company, Inc., WSEZ(FM)***

**FCC 84-68**

**BEFORE THE**

## FEDERAL COMMUNICATIONS COMMISSION

**WASHINGTON, D.C. 20554**

**In the Matter of**
**Liability of**

**TRIAD BROADCASTING COMPANY, INC.**
**Licensee of Radio Station WSEZ(FM)**
**Winston-Salem, North Carolina**
**for Forfeiture**

## MEMORANDUM OPINION AND ORDER

**(Adopted: March 1, 1984; Released: March 12, 1984)**

**BY THE COMMISSION:**

### I. *Introduction*

1. The Commission has under consideration (1) a Notice of Apparent Liability adopted May 26, 1983 (released June 3, 1983), FCC 83-261, issued to Triad Broadcasting Company, Inc., (Triad) the licensee of Radio Station WSEZ(FM), Winston Salem, North Carolina, (2) the licensee's supplement to petition for mitigation or remission of forfeiture dated August 15, 1983,[1] and (3) further comments filed on December 1, 1983.[2]

---

[1] A Petition for Remission or Mitigation of the forfeiture had been filed on June 30, 1983, in the licensee's behalf by the licensee's former counsel. Subsequently, an extension of time was granted to allow the filing of the Supplementary Reply. Since the Supplementary Reply contains a fuller discussion of the issues, we have relied upon it as well as a December 1, 1983 response to set forth the licensee's views.

[2] The further comments were submitted, on the licensee's behalf, by its co-counsel who represents Triad in connection with its application, BPH-830215AK, seeking to relocate WSEZ(FM)'s transmitter near Kernersville, North Carolina.

## II. *Background*

2. The forfeiture of $20,000 was assessed for wilful and repeated: (1) operation during the period January 15, to April 16, 1981, and between June 19, 1981 and January 29, 1982, from a new facility and at increased power without submitting the impedance measurements for the licensee's co-owned AM station, WAIR, on whose tower a new antenna was to be mounted, and other technical information specified in the construction permit, BPH-790727AQ, issued on May 21, 1980; (2) violation of Section 73.1620 of the Commission's Rules from January 15, 1981 to February 6, 1981 by failing to file a license application, FCC Form 302, within ten days after commencement of equipment and program tests; and (3) violation of Section 73.1620(c) of the Commission's Rules and Section 301 of the Communications Act of 1934, as amended from January 25 to January 29, 1982, by operating without authorization and after being notified in writing to cease program tests.

3. The Notice also pointed out that during an inspection on February 10, 1983, it was discovered that the licensee made significant changes in its antenna system without filing an application to modify its construction permit. The inspection disclosed that the station was operating with different transmission line length, different transmitter power output and a different antenna. Specifically, the variance between actual operation and the information in the application for construction permit on file indicated:

> (1) a changed center of radiation of twelve feet; and
>
> (2) a difference between the type of antenna, transmission line length, and transmitter power (20.68 kW vs. 24 kW authorized by the Commission's telegram).

In this connection, the Notice advised the licensee that its renewal application, BRH-810803WT, was being deferred pending receipt of properly completed FCC Forms 301 and 302 to modify WSEZ(FM)'s construction permit, BPH790727AQ, to the current operation of the station. Properly completed applications were filed on June 23, 1983 and appear to be in order for a grant.

## III. *Violations*

### A. *Failure to furnish complete and accurate information regarding WSEZ(FM)'s application to increase power.*

4. At the outset, the licensee failed to furnish certain information in connection with its application to increase power filed February 6, 1981 (FCC Form 302). Requests for the information were sent in Commission telegrams dated April 16, June 4, December 9, 1981 and January 7, 1982. Specifically, the April 16, 1981 telegram granted limited program test authority (PTA) to WSEZ(FM) until May 18, 1981, and required compliance with the terms of the

construction permit, BPH-790727AQ, and Section 73.1620 of the Commission's Rules. Essentially, this meant that before program tests with increased power would be authorized the licensee was required to submit impedance measurements for its co-owned station, WAIR, and to file a license application (FCC Form 302) within ten days of program test notification. The April 16, 1981 telegram also directed the licensee to furnish operating constants which it had omitted earlier in its FCC Form 302 and to verify the overall height above ground of the antenna without obstruction lighting within 20 days.[3] The operating constants and antenna height were required to be filed on or before May 6, 1981. Instead of furnishing the information, the licensee, on May 6, 1981, sought an extension of time in which to continue program tests. The May 6th letter, submitted by the licensee's counsel/engineer, Clifford J. Bond III, explained that additional time was needed because a defective electrical component made it difficult to make proper impedance measurements. The letter contained no operating constants or overall height of the antenna data; nor was any reference made in the letter to enclosures that may have contained such information. On June 4, 1981, the Commission, in response to the May 6th request, sent a telegram extending the program test authority through June 18, 1981. The telegram urged the licensee to furnish all the information requested in the telegram of April 16, 1981. On September 24, 1981, the licensee furnished the impedance measurements for Station WAIR but it did not include the operating constants or the overall height of antenna data which had also been requested in the April 16, 1981 telegram.

5. The Commission again requested the missing information on December 9, 1981 and January 7, 1982. On January 8 and 18, 1982, the licensee's president, Nicholas Patella, telephoned the Commission. He was told by a Commission staff engineer that the technical information (i. e. operating constants and antenna height data) had not been received and to furnish it promptly. Mr. Patella, as he had previously done, turned the task over to Clifford J. Bond, III. The information was furnished by letter dated January 22, 1982 and received in the Commission on January 27, 1982, two days after WSEZ(FM)'s PTA was revoked. On January 29, 1982, the staff extended the limited PTA to March 1, 1982. A further extension to conduct program tests was granted by Commission telegram dated February 22, 1982.

---

[3] It is the latter two items that the staff sought in its succeeding telegrams. The failure to furnish them led to the revocation of program test authority on January 25, 1982. The failure to furnish these items is disputed by the licensee in its reply to the Notice, discussed in paragraph 11.

B. *Commencement of equipment and program tests with increased power contrary to the terms of WSEZ(FM)'s construction permit.*

6. Based on information submitted by the licensee through Mr. Bond on March 29, 1982, it first appeared that WSEZ(FM) commenced unauthorized tests on January 15, 1981. However, based upon a subsequent review of the station's operating logs, obtained during a July 29, 1983 inspection of the station, it was determined that WSEZ(FM) conducted equipment and program tests with increased power as early as October 23, 1980 without first submitting impedance measurements and certain other technical information for its co-owned station, WAIR, as specified in its construction permit. WSEZ(FM)'s increased power operation as early as October 1980 is corroborated by Thomas F. Brewer, WSEZ(FM)'s former chief engineer. In a written statement dated June 7, 1983, Mr. Brewer explains that on October 30, 1980,[4] following installation of a new transmitter to increase the power from 34 kW to 100 kW, he was informed both by Mr. Patella and Mr. Bond that it was permissible to operate at 100 kW. Mr. Brewer states that he brought to Mr. Patella's attention the fact that the impedance measurements of WAIR were required and that they had to be sent to the Commission before the program tests would be authorized. According to Mr. Brewer, Mr. Patella relied upon the advice of Mr. Bond that a 30-day test period was allowed. Mr. Brewer stated that he was persuaded by Mr. Bond that a 30-day test period was allowed and that he advised Mr. Patella at the end of the 30 days and requested permission to return to the 34 kW power. He also reminded Mr. Patella of the need to take impedance measurements. According to Mr. Brewer, he was informed by Mr. Patella that Mr. Bond had approved the continuation of operation with power at 100 kW and that he (Mr. Bond) would take the measurements.

C. *Unauthorized operation between January 25 and 29, 1982, following revocation of WSEZ(FM)'s program test authority.*

7. The facts also show that the licensee engaged in unauthorized operation between January 25 and 29, 1982, during a period when its program test authority had been explicitly revoked. When the technical information discussed above was not received following the series of telegrams, the Commission, on January 25, revoked WSEZ(FM)'s PTA. On January 28, 1982, the licensee sent a telegram to the Commission requesting reinstatement of its PTA. In support of its request the licensee pointed out that the technical information had been forwarded by letter dated January 22, 1982. As indicated in

---

[4] In a more recent telephone conversation with a Commission staff member, Mr. Brewer advises that the actual date and time of the unauthorized increased power operation was October 20, 1980, at 11 a.m.

paragraph 5 the letter was received on January 27, 1982, and the staff, after review of the contents, reinstated WSEZ(FM)'s PTA on January 29, 1982.

## IV. *Licensee's Response*

8. In its responses to the Notice, the licensee indicates that on August 1, 1976, WSEZ(FM) retained the professional service of Clifford J. Bond, III, an attorney and engineer, to provide the staff of WSEZ(FM)'s and the co-owned station, WAIR(AM), with consultation regarding compliance with FCC Rules and that Mr. Bond agreed to take whatever steps were necessary to insure compliance with all applicable Commission Rules and policies. As discussed below, the licensee contends that the sole basis for the violations was its "good faith" reliance on its engineer/attorney's advice. The licensee describes itself as a victim of its counsel's "deliberate deception and incorrect advice."

### A. *Premature operation in January 1981 and failure to file application and technical information in a timely manner.*

9. With respect to premature operation at the new facility and failure to file a license application in a timely manner as required by the Rules, the licensee agrees that "the Commission is correct from a technical standpoint" that WSEZ(FM) did not timely file a license application within ten days after commencing program test notification to the Commission. Insofar as the premature operation is concerned, however, the licensee explains that it was the unsuspecting victim of "incorrect advice" from its attorney/engineer, Clifford J. Bond, III. The licensee claims that Mr. Patella was advised by Mr. Bond that WSEZ(FM) was authorized to commence program test authority when it completed its construction on October 30, 1980 and that he (Mr. Bond) would provide an explanation to the Commission when he filed the license application. The licensee asserts that this was corroborated by Mr. Brewer in his June 7, 1983 statement filed with the Commission. Thus, the licensee contends that "although WSEZ did commence operations earlier than authorized by the Commission's Rules . . . it did so based upon advice that it and its employees received from its . . . consultant, Clifford Bond." The licensee contends that since Mr. Bond "was the station's consulting engineer and attorney he was given authority to handle all station matters." The licensee asserts that WSEZ(FM)'s reliance upon its attorney to handle matters before the Commission is "the norm in the field." Mr. Patella alleges that Mr. Bond was once held in high regard by Mr. Patella and that WSEZ(FM) is not alone in being duped by Mr. Bond. According to Mr. Patella, Mr. Bond has represented numerous broadcast clients in North Carolina and other states that have also become unwitting victims of Mr. Bond's "bad advice and deception." Mr. Patella has set forth examples of Mr.

Bond's other apparent fraudulent activities or deceptive practices which resulted in charges of FCC rule violations being placed against the clients.

10. With regard to the logs submitted by Mr. Bond which dated the commencement of premature operation as January 15, 1981, the licensee states that it is unable to explain the discrepancy between those logs, submitted by Mr. Bond on March 29, 1982, and the ones found at the station, showing the commencement of operation as October 30, 1980. It surmises that the logs were altered after delivery to Mr. Bond and before submission to the Commission.

### B. *Failure to furnish complete and accurate technical information.*

11. The licensee asserts that the deceptive practices perpetrated on it led the Commission to conclude that the licensee had not furnished the required technical information. For instance, the licensee claims that it believed that the operating constants and overall height of the antenna data had been filed with the Commission on May 6, 1981 by Mr. Bond since "as far as WSEZ(FM) was concerned . . . it was given to Mr. Bond for filing." Thus, the licensee asserts that the Commission's telegrams of December 9, 1981 and January 7, 1982, repeating earlier requests for the technical information only confused it. The licensee says that, in order to clarify the matter, WSEZ(FM)'s president, Nicholas Patella, forwarded a copy of the January 7, 1982 telegram to Mr. Bond and that "Mr. Bond advised . . . that all of the information was on file and the FCC was in error." According to the licensee, Mr. Patella made telephone calls to the Commission on January 15 and 18 to determine the status of WSEZ(FM)'s license application. Mr. Patella concedes that he spoke with a Commission engineer in the FM Division and was told that the FCC did not have the information and to file it immediately. Mr. Patella indicated that he received a communication from Mr. Bond that the response to the January 7, 1982 telegram had been delayed due to weather conditions and was sent effective January 21, 1982. As indicated above, the response was not received by the Commission until January 27,,1982.

### C. *Unauthorized Operation*

12. With respect to the unauthorized operation itself for the four days the licensee contends that Mr. Bond informed WSEZ(FM) that the Commission's telegram of January 25, 1982, revoking WSEZ(FM)'s program test authority was "inoperative" and that "operation at full power was authorized by the rules and has been at all times." Mr. Patella states that he was advised by Mr. Bond that a new telegram would be sent by the Commission reinstating the PTA, but "not fully trusting Mr. Bond," on January 27, 1983, he contacted the Commission by telephone to confirm that his authority would be

reinstated. He asserts that the receipt of the Commission's telegram on January 29, 1982, reinstating his WSEZ(FM)'s PTA, relieved any immediate concern he had with the Commission. The licensee emphasized that "although WSEZ realizes that it should have gone off the air on January 25 pursuant to [the Commission's] telegram, it did not because it was advised by Mr. Bond that the . . . telegram was inoperative and in error." The licensee concludes that its decision to remain on the air was a "prudent" business decision because it would have lost a contract of $504 and perhaps others if it went off the air, and in any event its action is vindicated by the fact that the Commission reinstated WSEZ(FM)'s authority four days later.

### D. *Failure to advise the Commission on changes in the antenna system*

13. With respect to the discrepancy between the actual construction of the facilities and the data on file with the Commission discovered during the Commission's February 1983 inspection, Mr. Patella explains that, prior to commencement of actual construction in September 1980, he was persuaded by Mr. Bond to "utilize" a different transmitter and antenna than authorized by the construction permit granted in May 1980. The licensee explains that a completed application to modify the construction permit specifying the new transmitter and antenna was given by Mr. Bond to Mr. Patella for his signature and that it was signed and returned to Mr. Bond for filing with the Commission. Mr. Patella states that he has no signed copy because it was Mr. Bond's practice to send him a copy of what was to be filed with the Commission, with Mr. Bond retaining the official copy on behalf of the station.

### E. *Summary Of Response*

14. In sum, the licensee believes that it has been circumspect in its supervision and responsibility over WSEZ(FM) in referring matters to its consulting engineer/attorney because of his presumed high degree of expertise. With respect to the premature increased power operation, the licensee explains that both Mr. Patella and Mr. Brewer had been deceived into believing that Mr. Bond had obtained from the Commission "some kind of waiver" of the terms of the construction permit which required the impedance measurements to be made on WAIR(AM)'s antenna prior to the start of program tests. With respect to the failure to furnish the technical information that led to the revocation of its PTA, the licensee cites Mr. Bond's assurances that all technical information had been sent to the Commission notwithstanding Commission correspondence to the contrary. Similarly, Mr. Patella cites his repeated telephone calls to the Commission to determine what, if any, technical information was missing, his subsequent response, which he turned over to Mr. Bond for delivery to the Commission, and a copy of a message from

Mr. Bond, as examples of his attempt to comply with the rules. With respect to the continued unauthorized operation, the licensee cites his misplaced reliance upon Mr. Bond's advice that the Commission's telegram was in error. Thus, "WSEZ contends that its violations were a product of the deliberate and intentional act of its attorney/engineer in a malicious effort to abort the normal operations of the station."

## V. *DISCUSSION*

15. It is readily apparent from the circumstances in this case that the violations occurred on more than one day and, therefore, are repeated. *Friendly Broadcasting Co.*, 45 FCC 46, 23 RR 83 (1963), *Caranje Broadcasting Co., Inc.* 59 FCC 2d 332 (1976). Since the violations are repeated it is not necessary to reach the question as to whether they were wilful. *Paul A. Stewart*, 45 FCC 773, 25 RR 375 (1963). Based upon the responses dated August 15, and December 1, 1983, the Commission finds that the licensee repeatedly violated Sections 73.1620(a) of the Commission's Rules; operated contrary to the terms and conditions of WSEZ(FM)'s instrument of authorization; and violated Section 73.1620(c) of the Commission's Rules and Section 301 of the Communications Act of 1934, as amended, on the dates and in the manner set forth above.

16. We will assess the forfeiture in its full amount. Triad does not dispute that it repeatedly violated the rules as charged. It argues, however, that the forfeiture should be reduced or cancelled because the licensee was the unwitting victim of "bad advice" from its attorney/engineer. It is a well established principle that advice of either a legal counsel or a contract engineer cannot excuse a clear breach of duty of a Commission licensee. *Asheboro Broadcasting Co.*, (legal counsel), 20 FCC 2d 1, (1969); *Wagenvoord Broadcasting Company* (contract engineer), 35 FCC 2d 361 (1972). A licensee will not be excused for violation because he may have been deceived by an employee since licensees are responsible for acts of their employees. *James C. Vernon*, 30 FCC 2d 456 (1971). Also, oversight or failure to acquaint itself with the Commission's requirements will not excuse a licensee from its obligation to operate its station in compliance with the terms of the authorization and the Commission's Rules. *Empire Broadcasting Corp.*, 25 FCC 2d 68 (1970). The amount of the forfeiture is determined after consideration of numerous factors including the seriousness of the violation, the circumstances under which they were committed, the duration of the violation and the financial condition of the licensee. *The McLendon Corp.*, 19 FCC 2d 224 (1969); *Laury Associates, Inc.*, 27 FCC 2d 870, (1971). In this case, the violations were serious in that they involved a surrender of a substantial measure of authority for station operation to the licensee's attorney/engineer. Also, the premature/unauthorized operation continued for several months. The

licensee has advanced no argument reflecting on its ability to pay the forfeiture. We have carefully considered the licensee's responses and all the circumstances in this case. We are not persuaded by the licensee's arguments that a reduction or cancellation of the forfeiture amount is warranted.

17. We are not unmindful of our initial choice here of the sanction of forfeiture rather than the more severe sanction of denial of license renewal. There may be reasons for designating a licensee for an evidentiary hearing where there are unresolved substantial or material questions of fact regarding a licensee's relinquishment of supervision and responsibility in permitting premature operation, engaging in continued unauthorized operation after receipt of a Commission directive to cease operation and failing to furnish complete and accurate technical information in connection with both its application for a construction permit and its change in the antenna system as occurred here. However, after careful review of all the circumstances of this case and based upon all the available information we do not believe that the licensee had been aware that its counsel's/engineer's advice and claims were inaccurate. Thus, the licensee's candor is not in issue and its basic qualifications have not been impugned to the point of requiring such a hearing. As was stated in *Fox River Broadcasting, Inc.* 88 FCC 2d 1132, 1137 (Rev. Bd. 1982), modified 53 RR 2d 44 (1983), "the core of lack of candor . . . is omission *viz.*, failure to be completely forthcoming in the provision of information which would illuminate a decisional matter." The administrative remedy of total disqualification would occur, however, where a wilful intent to deceive can be proved. The information developed in our investigation persuades us that the licensee failed to remain diligent in assuring that its operation was at all times in compliance with critical technical requirements. We believe that under the circumstances an imposition of a forfeiture is appropriate.

18. We wish to make clear, however, our decision to refrain from designating WSEZ(FM)'s application for renewal for an evidentiary hearing does not constitute an abandonment of our position set forth in *Wadeco, Inc. v. F.C.C.*, 628 F. 2d 122 (1980). There, the licensee with knowledge of the true facts, attempted to hide behind the misleading statements of its legal counsel. Were that the case here, we would set the licensee's application for hearing. See *RKO General, Inc. v. F.C.C.*, 670 F. 2d 215, at 231 (D.C. Cir. 1981), *cert. denied*, 102 S. Ct. 1974 (1982). and *Wadeco, supra.*, at page 128.

19. In *Wadeco*, the licensee's president, James K. Wade, acquiesced to the filing, by its attorney, of a purported loan-commitment letter which Wade knew was not a valid commitment. During the processing of Wadeco's application, Wadeco's attorney filed with the Commission a loan commitment letter from the Castle Trust bank which represented that the bank would participate the loan to other institutions. That provision was not acceptable to the Commis-

sion and it made an inquiry of Wadeco to learn the identity of the other participating institutions. The bank would not reveal the other institutions. However, Wadeco's attorney prevailed upon Castle Trust to have its loan and commitment-letter amended to delete the reference to the participating institutions. The Commission disqualified Wadeco and the court affirmed. The court found that while Wade determined the letter to be useless he "never objected to [his attorney's] sleight of hand in the letter's revision." *Wadeco, supra*, 628 F. 2d at 127. The court ruled that the amended loan-commitment letter misrepresented to the Commission the fact that other institutions might participate in the loan with Castle Trust and that Wade acquiesced in that misrepresentation. The court affirmed the Commission's finding that Wade knew of the misrepresentation when it was made, or shortly thereafter, and that his acquiescence allowed the misrepresentation to remain uncorrected in Wadeco's file. The court pointed out that Wade "need only have exercised greater firmness in ordering [his attorney] to withdraw the Castle Trust letter whose condition Wadeco could no longer satisfy as Wade *knew* " (emphasis supplied). *Wadeco, supra*, 628 F.2d at 128.

20. In this case, however, it appears from information contained in the filings that counsel for WSEZ(FM) has acted in a duplicitous fashion *vis-a-vis* WSEZ(FM) and *vis-a-vis* the Commission. In contrast with *Wadeco*, however, apparently neither Triad nor Patella was aware of the inaccuracy of the claims made by its attorney. The licensee simply relied on its counsel's claims that certain documents were filed when in fact they were not. In another instance, Patella naively relied upon his counsel's representations as to the nature of his conversations, if any, with the Commission. At all times the licensee was unaware that these claims were inaccurate. Unlike *Wadeco*, Patella made affirmative attempts, albeit belated, to learn whether his counsel's claims were accurate.

21. Triad's attempt to shift all blame, however, or explain away its failure to comply with the rules does not justify the noncompliance with the Commission's rules. As mentioned, the Commission has consistently refused to excuse licensees from forfeiture penalties where actions of employees or independent contractors result in violations. The licensee here needed only to exercise better judgment and closer supervision of its counsel, particularly when numerous Commission telegrams over a long period of time repeated the same request. At some earlier point the licensee should have realized that the advice being received was suspect. For instance, Patella's unquestioned reliance upon his counsel's advice that the Commission's telegram ordering WSEZ(FM) off the air was in error demonstrated a lack of supervision and responsibility. We are unable to conclude, however, that the circumstances resemble to any degree the seriousness of the situation in *Wadeco*. See also *Cumberland Broadcasting Corporation v. FCC*, 647 2d 1341 (D.C. Cir. 1980) where

a brief acquiescence in attorney misconduct did not warrant disqualification.

22. In view of the foregoing, and pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED, That Triad Broadcasting Company, Inc., licensee of Station WSEZ(FM), Winston-Salem, North Carolina, FORFEIT to the United States the sum of twenty thousand dollars ($20,000) for repeated violation of the Commission's Rules as set forth above. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission payable to the order of the Federal Communications Commission.

23. In regard to this forfeiture proceeding, Triad may take any of the actions set forth in Section 1.80 of the Commission's Rules and Section 504(b) of the Communications Act of 1934, as amended, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

**Fairness Doctrine**
**News Deceptive, Slanted, Distorted**

**Where the subject issue involves a foreign country, in order to establish a prime facie Fairness Doctrine complaint a complainant must show that the disputes involve our government's policy toward the other country or countries. Where a complainant accuses a licensee of distorting and biasing the news, the complainant must provide extrinsic evidence of such distortion and bias.**

***–Ulster-American Heritage Foundation***

**FCC-84-69**

BEFORE THE

# FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Complaint of
ULSTER-AMERICAN HERITAGE FOUNDATION
against
Television Stations KCET and KNBC,
Los Angeles, California

## MEMORANDUM OPINION AND ORDER

(Adopted: March 1, 1984; Released: March 14, 1984)

BY THE COMMISSION:

1. The Commission has before it an Application for Review of the Mass Media Bureau's ruling of June 3, 1983, filed on June 27, 1983, by David McCalden, Director of the Ulster-American Heritage Foundation (complainant). A copy of the Bureau's ruling is appended to this Memorandum Opinion and Order.[1]

### *The Complaint*

2. The Bureau ruled on two complaints against television stations KCET and KNBC, Los Angeles, California. The complaint against KCET involved a program broadcast on September 30, and again on October 2, 1982, entitled *Ireland: A Television History*, which complainant maintained "was biased against Ulster Loyalists and in favor of Irish Catholics." The complaint against KNBC

---

[1] The complainant filed an additional pleading on February 22, 1984. The Commission accepted it although it was late. However, it did not present any relevant information.

involves a statement broadcast by weatherman Kevin O'Connell on January 14, 1983, stating, "the Irish Northern Aid Committee [NORAID] would be holding a blood drive to 'commemorate all the children killed on Bloody Sunday.'" Complainant disagrees with the content of that announcement and believes its effect is to "mislead the American public and political leaders." The complaints were denied by the Bureau in its letter of June 3, 1983. According to complainant the issue was "[w]hether or not children were killed on Bloody Sunday, and whether or not NORAID has any legitimacy worthy of promotion by means of free air time." The Bureau stated that in order to establish a prima facie Fairness Doctrine complaint a complainant must demonstrate that the issue involved is both controversial and of public importance. The Bureau said that in situations such as that in the KCET complaint, where the issue involves a foreign country, disputes arising outside of the United States do not create fairness obligations for an American station unless the disputes involve our government's policy toward the other country or countries. *J. Allen Carr*, 30 FCC 2d 594, 896 (1971). Although complainant maintains that the dispute about which it is concerned involves U.S. arms sales policy toward Northern Ireland, it does not establish that this matter was discussed in *Ireland: A Television History*. The Bureau further held that complainant did not provide a basis for its claim, in either complaint, that the issues were controversial and of public importance.[2] Furthermore, with respect to complainant's allegations as to the biased and misleading nature of the programs, the Bureau noted that absent extrinsic evidence of deliberate distortion, it cannot properly investigate to determine whether an account of the news is "biased" or false.

3. On June 27, 1983, complainant filed an Application for Review in which it merely reiterated the arguments made in its original complaint.

### *Discussion*

4. Having carefully examined the pleadings before us, we cannot conclude that complainant has presented any new or additional information or arguments that would warrant reversal of the Bureau's ruling. We agree with the Bureau that the complainant did not establish that the issues discussed during the subject broadcasts were controversial and of public importance. In support of its argument regarding the controversiality and public importance of the issues, complainant, for the first time in its Application for Review, describes three bills, pending in Congress which are characterized as follows:

---

[2] We note that the Bureau did not reach the question of whether complainant sustained its burden of proof relating to other procedural requirements under the Fairness Doctrine.

> (a) The Ottinger Bill, which would require American companies operating in Northern Ireland to discriminate against Protestants.
>
> (b) The Biaggi Bill, which would authorize U.S. Foreign Aid to the reactionary regime in Dublin, once they had forcibly annexed the neighboring foreign territory of Northern Ireland.
>
> (c) The Gilman Bill, which would curtail American military co-operation with the United Kingdom, where that aid related to Northern Ireland in any way.

Within this framework, we note that "questions of fact or law upon which the designated authority has been afforded no opportunity to pass," will not be considered if included in an Application for Review.[3] The existence of these bills was not brought to the Mass Media Bureau's attention by complainant, either in its original complaint or in a Petition for Reconsideration, and therefore may not be a factor that is considered in its Application for Review. However, even if we were to consider these new asserted facts, the mere existence of pending bills, in and of themselves and without a showing of relevance to the alleged controversial issue of public importance, does not establish the controversiality and public importance of an issue. Furthermore, KCET's alleged failure to comply with the Fairness Doctrine is based upon a single statement, "that the Irish Northern Aid (NORAID) Committee would be holding a blood drive to 'commemorate all the children killed on Bloody Sunday.'" The Fairness Doctrine applies to discussions of controversial issues of public importance, not to a single statement, and "a policy of requiring fairness in each statement or inference from statements would involve the agency much too deeply in broadcast journalism." *NBC (AOPA)*, 25 FCC 2d 735 (1970).

5. With respect to complainant's allegations as to the biased nature of the subject program, we agree with the Bureau's ruling as to the lack of extrinsic evidence of deliberate distortion. As the Bureau stated, absent extrinsic evidence of deliberate distortion, we cannot properly investigate to determine whether an account of the news is "biased" or false.

6. Accordingly, in view of the above considerations, the Application for Review filed by complainant IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

---

[3] See Commission Rule 1.115(c) (47 C.F.R. § 1.115(c)).

## APPENDIX

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

JUN 03 1983

IN REPLY REFER TO:
8330-L
C4–708

Mr. David McCalden
Director, Ulster-American Heritage Foundation
P. O. Box 3849
Manhattan Beach, California 90266

Dear Mr. McCalden:

This is in further reference to your complaints against television stations KCET, Los Angeles, California and KNBC, Los Angeles, California. On December 30, 1982, your original complaint against KCET, received November 23, 1982, was denied for failure to submit a prima facie Fairness Doctrine complaint. Thereafter, you submitted an amended version on January 19, 1983. We responded to this correspondence by letter dated March 23, 1983, in which we discussed the elements of a prima facie complaint. Your original complaint against KNBC was received in this office on February 15, 1983. In a letter dated March 3, 1983, we advised you as to the requirements for a prima facie complaint. In response to these letters you submitted the present correspondence, received on April 19, 1983.

Your complaint against KCET involves a program broadcast by KCET on September 30 and October 2, 1982, entitled *Ireland: A Television History*, which you maintain was biased against Ulster Loyalists and in favor of Irish Catholics. Your complaint against KNBC involves a statement broadcast by weatherman Kevin O'Connell on January 4, 1983, stating "that the Irish Northern Aid [NORAID] Committee would be holding a blood drive to 'commemorate all the children killed on Bloody Sunday.'" You disagree with the content of that announcement and believe its effect is to "mislead the American public and political leaders."

In your complaint against KCET you define the issue involved as "whether or not Northern Ireland is a fair, humane and just society, governed by the rule of law and democratic principles." In your KNBC complaint that "*[t]he issue* is whether or not children were killed on Bloody Sunday, *and* whether or not NORAID has any legitimacy worthy of promotion by means of free air time."

As we advised you in our past correspondence, an essential element of a prima facie Fairness Doctrine complaint is that the issue involved be controversial *and* of public importance. As we also have advised you, in situations such as that in your KCET complaint where the issue involves a foreign country, disputes arising outside of the United States do not create fairness obligations for an American station unless the disputes involve what our government's policy should be toward the other country or countries. Although you maintain that the dispute about which you are concerned involves U.S. arms sales policy toward Northern Ireland, you do not establish that this matter was discussed in the program *Ireland: A Television History.*

As to KNBC, in our letter of March 23, 1983 regarding that complaint we advised you that you provided no basis for your claim that the subject issue was controversial *and* of public importance. You still have provided no additional information regarding this aspect of your complaint. Consequently, you have not established a prima facie case of a Fairness Doctrine violation in either complaint.

With respect to your allegations that the program broadcast by KCET was "biased" against Ulster Loyalists and "that KNBC broadcast a lie," please note that the Commission is not the national arbiter of the truth of a news event or the judge of the wisdom, accuracy or adequacy with which it may have been handled on the air. Further, as stated in our letter of March 23, absent extrinsic evidence of deliberate distortion, we cannot properly investigate to determine whether an account of the news is "biased" or false. We explained extrinsic evidence to you in our December 30, 1982 letter and its enclosure. You assert that since the subject program was manufactured by "anti-Ulster governments" and the licensee broadcast it, then "an anti-Ulster, pro-British and Irish government bias," was inevitable. However, these allegations do not provide extrinsic evidence that KCET *intentionally* attempted to falsify or distort the news. Therefore, you have not provided a prima facie case of deliberate licensee distortion.

As we have previously advised you, the Commission believes it best serves the public interest by keeping out of the programming judgments of broadcasters as much as possible. You have furnished no information to warrant Commission action on your complaints.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within thirty days of the date of public notice of this letter (see Commission Rule 1.4(b) [47 C.F.R. § 1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail. Copies must be sent to the parties to the complaint. See Commission Rule 1.115 (47 C.F.R. § 1.115).

Sincerely,

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

**Attorney as Witness**
**Attorney, Removal From FCC Hearing**
**Interlocutory Ruling Appeal From**
**Motion to Strike**

> **Review Board affirmed ALJ's interlocutory ruling requiring withdrawal of counsel where counsel was to be witness in proceeding. Request in opposition to appeal urging that counsel's firm also be disqualified was struck since it was, in effect, an unauthorized and untimely appeal.**

**–*Wind River Communications, Inc.***
**MM Docket No. 83–763**

**FCC 84R–8**

BEFORE THE

## FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

| | |
|---|---|
| In re Applications of | |
| WIND RIVER COMMUNICATIONS, INC.<br>Riverton, Wyoming | MM Docket No. 83–763<br>File No. BPH-820908AC |
| RADIO WEST, INC.<br>Riverton, Wyoming | MM Docket No. 83–764<br>File No. BPH-821019AP |
| For Construction Permit for a New FM Station | |

## MEMORANDUM OPINION AND ORDER

(Adopted: January 31, 1984; Released: February 3, 1984)

BY THE REVIEW BOARD: Board Member Blumenthal absent.

1. The Review Board has under consideration: (a) an appeal, filed December 29, 1983, by Benito Gaguine, Esq., pursuant to Section 1.301(a)(5) of the Commission's Rules, 47 CFR 1.301(a)(5), from an interlocutory ruling by Administrative Law Judge Joseph Chachkin disqualifying Mr. Gaguine from acting as counsel for Wind River Communications, Inc. in this proceeding (Memorandum Opinion and Order, FCC 83M-4811, released December 22, 1983); and (b) a motion, filed January 16, 1984, by Mr. Gaguine, to strike part, or all, of Radio West, Inc.'s opposition to the appeal. The ALJ's ruling was premised on a finding that Wind River's original counsel was a necessary

witness, under an issue specified in this proceeding, within the meaning of Disciplinary Rule 5–102(A) of the Code of Professional Responsibility and Model Rule 3.7(a) of the Model Rules of Professional Conduct, both of which require withdrawal as counsel when the lawyer becomes a witness. For the reasons set out below, we conclude that the ALJ did not abuse his discretion in disqualifying counsel, and we grant the motion to strike Radio West's opposition to the extent that the pleading also urges disqualification of counsel's entire firm.

2. Counsel's disqualification stems from the ALJ's specification of an issue to determine whether principals or agents of Wind River threatened to file petitions to deny, or applications in conflict with, renewal applications of one of Radio West's principals in an effort to induce Radio West to dismiss its application in this proceeding. The issue, in part, involves a telephone conversation between counsel and local counsel for the Radio West principal. Counsel argues in his appeal, however, that his testimony relates to an uncontested issue—an exception to the withdrawal requirements of Disciplinary Rule 5–102(A) and Model Rule 3.7(a)—since he expressed a willingness on the record to stipulate to the statements which local counsel alleges were made in the telephone conversation, and that, therefore, there is no justification for his disqualification because he is not a necessary witness within the meaning of either rule.

3. We will deny the appeal. Section 1.243 of the Commission's Rules, 47 CFR 1.243, confers upon the presiding ALJ authority to regulate the course of the hearing and to rule upon evidentiary questions. This authority is plenary, and invests the presiding officer with great latitude, *see RKO General, Inc.*, 48 FCC 2d 826, 31 RR 2d 303 (Rev. Bd. 1974). It is well established that the ALJ's interlocutory rulings in this regard will not be disturbed unless they are arbitrary, capricious, or an abuse of discretion. *See Western Connecticut Broadcasting Co.*, 31 FCC 2d 807, 21 RR 2d 863 (Rev. Bd. 1971); *WMOZ, Inc.*, 5 RR 2d 732 (Rev. Bd. 1965). Here, the ALJ concluded that counsel's testimony was not only material to the issue specified, but was the sole testimony available on Wind River's behalf concerning the subject telephone conversation, and that considerable dispute exists concerning the purpose and intent of the call. FCC 83M-4811, para. 3. Thus, counsel's assertion that his testimony relates to an uncontested issue is not persuasive nor does it demonstrate that the ALJ abused his discretion in any manner. Rather, it is clear that the ALJ's exercise of discretion in concluding that counsel was a necessary witness and thus compelled to withdraw was neither arbitrary nor unreasonable.

4. Radio West's request seeking disqualification of counsel's entire firm will be struck because it is, in effect, an unauthorized and untimely appeal. Except for rulings appealable as a matter of right, not relevant here, appeals from interlocutory rulings of the presid-

ing officer may be filed only if allowed by the presiding officer. *See* Section 1.301(b) of the Commission's Rules, 47 CFR 1.301(b). Waiver of this requirement will not be granted unless it is demonstrated that there has been "such a flagrant abuse of discretion as would inevitably require a reversal of the Initial Decision and a hearing *de novo*; or where the proceeding involves basic and far reaching considerations of public policy and vital concerns relating to the public interest which could not otherwise adequately be protected." *See Communications Satellite Corp.*, 32 FCC 2d 533, 534, 23 RR 2d 286, 288 (1971); *Hanover Radio, Inc.*, 91 FCC 2d 849, 52 RR 2d 403 (Rev. Bd. 1982). In the instant case, Radio West neither sought nor obtained the ALJ's consent to appeal his ruling to allow counsel's firm to represent Wind River on withdrawal of original counsel. Moreover, even if the appeal were authorized, Radio West did not file it within five days after the ALJ's ruling, as required by Section 1.301(c), and further compounded its procedural faults by including its request in a responsive pleading. Introduction of new matters in responsive pleadings renders "meaningless provisions in the rules for a fair opportunity by another party to respond to allegations" or compels "the addition of supplementary pleadings not ordinarily contemplated by the rules." *Industrial Business Corp.*, 40 FCC 2d 69, 70, 26 RR 2d 1447, 1449–1450 (Rev. Bd. 1973).

5. Beyond these procedural failings, we note that Radio West merely argues in its opposition that Disciplinary Rule 5–102(A) provides that a firm shall not continue representation of a client if one of its lawyers has withdrawn as counsel because he or she was requested to be a witness. The ALJ previously rejected this contention, relying instead on Model Rule 3.7(a) which deletes the withdrawal requirement concerning the firm except in some very limited situations not pertinent here. The Model Rules, adopted by the American Bar Association in August 1983, supercede its previous Disciplinary Rules of the Code of Professional Responsibility and are currently under study in the District of Columbia. In *Dutchess Communications Corp.*, FCC 83M-3717, released October 21, 1983. a different ALJ disqualified a firm from acting as counsel following the withdrawal of one of its attorneys as counsel to be a witness; however, that ruling was never appealed. Here, it is not necessary for the Board to subscribe to either ALJ's ruling because we can conclude on the record before us that Radio West has failed to demonstrate that the ruling complained of would require a later remand or that it involves a vital concern relating to the public interest that could not otherwise be adequately protected. Other objections relating to timeliness and length of Radio West's responsive pleading are rejected. The pleading was timely filed, *see* Section 1.4(f)-(i) of the Commission's Rules; and it substantially complied with our rules governing the length of pleadings. *See* Section 1.48(a).

6. ACCORDINGLY, IT IS ORDERED, That the Appeal of

Disqualification Order, filed December 29, 1983, by Benito Gaguine IS DENIED; and

7. IT IS FURTHER ORDERED, That the Motion to Strike, filed January 16, 1984, by Benito Gaguine, IS GRANTED to the extent indicated herein, and IS DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

☆ U.S. GOVERNMENT PRINTING OFFICE: 1983—421-692/12